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In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority, in cases where a tariff is filed and becomes effective, but is thereafter found to have violated an approved motor carrier rate bureau agreement, to invalidate the filing upon discovery of the violation and thereby render the unlawful tariff void ab initio.



PARTIES TO THE PROCEEDING

The United States was a respondent below and is a petitioner here. Respondents here include, in addition to the American Trucking Associations, Inc., the following original petitioners below: Central States Motor Freight Bureau; Central and Southern Motor Freight Tariff Association Inc.; Eastern Central Motor Carriers Association; Middle Atlantic Conference; Middle West Motor Freight Bureau; National Motor Freight Traffic Association Inc.; New England Motor Rate Bureau Inc.; Niagra Frontier Tariff Bureau Inc.; Pacific Inland Tariff Bureau; Rocky Mountain Motor Tariff Bureau Inc.; and Southern Motor Carriers Rate Conference. Respondents here also include the following intervenors below: The National Small Shipments Traffic Conference, Inc.; the Drug and Toilet Preparation Traffic Conference, Inc.; the National Association of Specialized Carriers, Inc.; Ohio Motor Freight Tariff Committee Inc.; Household Goods Carriers Bureau Inc.; Steel Carriers Tariff Association Inc.; Heavy & Specialized Carriers Traffic Bureau; Alaska Carriers Association Inc.; Bulk Carriers Conference Inc.; and Motor Carriers Traffic Association, Inc.

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v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (App., *infra*, 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the court of appeals (App., *infra* 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (App., *infra*, 94a-95a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. IV) 10706, 10762, 11701, and 11705, are set forth at App., *infra*, 96a-100a.

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. IV) 1 *et seq.*, carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[1] Once a tariff is in effect, carriers must charge and shippers must pay the rates named in the tariff.

Since 1948, motor carriers subject to regulation by the Commission have been authorized to enter into rate agreements with other carriers (Reed-Bulwinkle Act, ch. 491, 62 Stat. 472, now codified at 49 U.S.C. (Supp. IV) 10706(b)).[2] The carriers have established rate bureaus to facilitate the negotiation of collective rates.[3] The carriers' activities in a rate bureau do not violate the antitrust laws, so long as the agreement establishing the bureau has been approved by the Commission, and the carriers' actions conform to the agreement. 49 U.S.C. (Supp. IV) 10706(b); see *Motor Carriers Traffic Association* v. *United States*, 559 F.2d 1251, 1253-1254 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

Until Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 42 U.S.C. (Supp. IV)

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[1] The waiting period for railroad rates is 20 days (10 days for reductions), 49 U.S.C. (Supp. IV) 10762(c)(3), and motor carrier rates become effective after 30 days, 49 U.S.C. (Supp. IV) 10762(a)(2). The Commission, however, has the power to shorten the waiting period. 49 U.S.C. (Supp. IV) 10762(d)(1).

[2] Although the Reed-Bulwinkle Act also applies to rail carriers (49 U.S.C. (Supp. IV) 10706(a)), this case involves only motor carriers and shippers.

[3] The rate bureaus also act as their members' agents in submitting to the Commission tariffs containing the collective rates, and also tariffs containing rates established by their individual members.

10101 *et seq.*, the Commission had broad discretion to define the conditions under which it would approve rate bureau agreements. See App., *infra*, 2a; H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947). In Section 14 of the Motor Carrier Act of 1980 (94 Stat. 803), however, Congress enacted specific statutory restrictions with respect to rate bureaus and rate bureau agreements. Motor carrier rate bureaus must comply with these if they wish to maintain their antitrust immunity.[4] In imposing these restrictions, Congress intended to narrow the Commission's discretion to approve or disapprove agreements by creating a presumption that agreements including the specified restrictions would be approved. H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 29 (1980); App., *infra*, 6a-7a.

2. The Commission implemented Section 14 with the rules adopted in *Motor Carrier Rate Bureaus — Implementation of P.L. 96-296*, Ex Parte No. 297 (Sub-No. 5) (ICC Dec. 19, 1980) (App., *infra*, 32a-72a). Although the rules cover a wide variety of subjects, this petition involves only the Commission's decision (App., *infra*, 66a-68a) that tariff rejection is an appropriate remedy for proven violations of rate bureau agreements.[5] The Commission determined

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[4] For example, Section 14(a) (94 Stat. 805) of the Act restricts voting on collective proposals to those carriers that have authority to participate in the transportation to which the proposal applies; bars bureau protests of any motor carrier rate proposal; limits discussion of general rate increases to industry average costs; imposes strict limits on bureau handling of independent action proposals; requires completely open bureau meetings; and bans any discussion of, or voting on, single-line rates after January 1, 1984. 49 U.S.C. (Supp. IV) 10706(b)(3)(D). That Section also requires the bureaus to submit new agreements incorporating the statute's restrictions to the Commission for approval (49 U.S.C. (Supp. IV) 10706(c)).

[5] In the court of appeals, respondents here also challenged Commission rules pertaining to advance notice of independent action by individual carriers; cancellation of outstanding special permission authorities waiving statutory tariff filing procedures; limitations on discussion of general rate increases; authorization of sound recordings at open bureau meetings; and the interpretation of the statute's restriction on discussion of rates that limit liabilit, (App., *infra*, 10a-24a).

(App., *infra*, 66a, 68a) that it would exercise its authority[6] to reject (*i.e.*, invalidate ab initio) effective tariffs where there is proof of "significant" and "clear" violations of an approved agreement.[7] The Commission explained that effective administrative remedies are needed to assure compliance with these approved bureau agreements because such compliance is a statutory prerequisite to immunity for activities that would otherwise be a per se violation of the antitrust laws. It is therefore necessary "to enforce vigorously" the limitations imposed by the agreements (App., *infra*, 66a, 68a). The Commission also made clear (App., *infra*, 82a, 90a) that before a tariff is rejected, a bureau will have an opportunity to be heard and a right to appeal. In sum, the Commission stated, the rejection remedy will not prevent the bureaus "from establishing lawful rates but only rates formulated in violation of the antitrust laws" (App., *infra*, 82a).

3. The court of appeals affirmed the Commission's power to reject tariffs that violate rate bureau agreements, so long as the rejection occurs *before* the tariffs become effective (App. *infra*, 24a-26a). However, the court struck down the Commission's rules insofar as they authorize the rejec-

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[6] The commission relied for this authority on 49 U.S.C. (Supp. IV) 10762(e) which provides:

> The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

[7] Where a lesser violation of an agreement is shown, the tariff will be suspended or investigated (App., *infra*, 68a). Because a rejected tariff is considered void ab initio, rejection of a tariff increase subjects the carrier to overcharge liability based on the pre-existing rate, while suspension only prevents use of the new tariff prospectively. See 49 U.S.C. (Supp. IV) 11705(b)(1). The Commission also noted (App., *infra*, 68a) that it would continue to refer to the antitrust enforcement authorities the results of Commission investigations into alleged violations of bureau agreements, and would continue its practice of withdrawing approval of agreements of bureaus that failed to adhere to approved procedures. Although the court of appeals held (App., *infra*, 27a & n.26) that the suspension remedy applies only to proposed tariffs, neither that remedy, nor the remedies of investigation, referral, or withdrawal are at issue here.

tion of effective tariffs.[8] The court held that the underlying statute prohibits the rejection of a tariff after it has become effective (App., *infra*, 29a). The court stated (App., *infra*, 27a) that when a filed and effective tariff is found to violate a rate bureau agreement, the Commission may prescribe the proper rate and that liability for damages (as distinguished from overcharges) then may arise.[9] But, the Court concluded, once a tariff has become effective, requiring the carrier to refund, as an overcharge, the difference between the rate paid and the former tariff "undermines the uniformity and reliability interests that the system of tariff filing was meant to foster" (App., *infra*, 28a). Finally, the court distinguished the "two lines of cases" that it recognized "shed doubt" on its conclusion (App., *infra*, 29a).[10]

REASONS FOR GRANTING THE PETITION

As we explained in our response in *Aberdeen & Rockfish R.R.* v. *United States* and *National Motor Freight Traffic Ass'n* v. *United States*, Nos. 82-707 and 82-804, the decision below conflicts with the Fifth Circuit's decision in that case, creating confusion over the Commission's authority to enforce the provisions of the Interstate Commerce Act by rejecting tariffs after they have become effective. Moreover, the invalidation of that authority in this case substantially impairs the Commission's ability to carry out its statutory duty to assure that the antitrust immunity granted to collective ratemaking will remain consistent with the na-

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[8] With the exception of the portion of the rules dealing with blanket special permission authority, which the court invalidated for failure to comply with Administrative Procedure Act, (5 U.S.C. 551 *et seq.*) notice and comment procedures, the other portions of the rules were upheld. See note 5, *supra*.

[9] Damages are not necessarily measured against an existing or former rate. 49 U.S.C. (Supp. IV) 11705(b)(2). In contrast, overcharges are defined as amounts that exceed the applicable rate set forth in a tariff filed under the Act's tariff filing requirements. 49 U.S.C. (Supp. IV) 11705(b)(1).

[10] These cases are discussed in our brief in response to the petitions for a writ of certiorari in *Aberdeen & Rockfish R.R.* v. *United States* and *National Motor Freight Traffic Ass'n* v. *United States* at 9-10 (Nos. 82-707 and 82-804).

tional transportation goals. Accordingly, this case presents questions of recurring and practical importance that warrant this Court's review.

1. The decision below cannot be reconciled with *Aberdeen*. In that case, the court drew a distinction between "applicable" rates (those that have been filed and accepted by the Commission) and "lawful" rates (rates conforming to the demands of the Act and Commission regulations), and concluded that shippers must always pay the "applicable" rate, but that they are entitled to recover overcharges if the Commission later rejects the tariff after detecting a defect making the rate unlawful. *Aberdeen & Rockfish R.R.* v. *United States*, 682 F.2d 1092, 1101-1102 (5th Cir. 1982). Here, in contrast, the Eleventh Circuit held that the Commission may *never* reject an effective tariff. Thus, it is clear that the tariff rejection rule affirmed by the Fifth Circuit (and now in effect) would be struck down by the court below.[11]

The existing situation, in which the Commission has the power to reject effective but unlawful tariffs in some circuits but not in others, severely impairs the power of the Commission to regulate on a uniform nationwide basis.

2. We have explained in our response in *Aberdeen* why we believe that the Commission has the statutory authority to reject effective tariffs.[12] We suggested there (at 9 n.12)

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[11] As we further explain in our *Aberdeen* response (at 9) other circuits are also in disagreement about the Commission's power to reject effective tariffs. See *Chicago, M., St. P. & P.R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957); *Genstar Chemical, Ltd.* v. *ICC*, 665 F.2d 1304, 1308-1309 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982); *Providence & W.R.R.* v. *United States*, 666 F.2d 736, 744 (1st Cir. 1981).

We note that *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976), does not preclude ICC rejection of tariffs that violate rate bureau agreements. The court's primary concern in *Delta* was that the CAB, in violation of its statutory mandate, failed to conduct a required hearing before rejecting an effective tariff (543 F.2d at 254). In sharp contrast, ICC rejection provisions allow for complaint, answer, and reply, and fully satisfy the hearing requirement of 49 U.S.C. (Supp. IV) 10704(a)(1).

[12] In addition to the arguments discussed in our *Aberdeen* response, the court below suggested (App., *infra*, 28a) that the rejection of ef-

that it would be appropriate for this Court to consider this case together with *Aberdeen*. We urge the Court to grant certiorari in both cases, thus placing before the Court a variety of contexts in which the rejection power issue may arise. For example, power to reject tariffs is particularly important in the context of the collective ratemaking provisions involved in this case. The statutory plan embodied in 49 U.S.C. (Supp. IV) 10706 balances the competing policies embodied in the antitrust laws and the Interstate Commerce Act by permitting collective ratemaking only when carriers comply with the terms of Commission-approved agreements. Compliance with those agreements is, therefore, the keystone of the statutory structure. Because the Commission has approved the agreements, and has expert knowledge of the rate bureaus' actual operations, it is clearly well equipped to determine whether rate bureaus are adhering to their agreements. Indeed, the courts, including the court below, have confirmed that the Commission should take an active role in preserving the statutory balance by ensuring rate bureau compliance with approved agreements.[13]

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fective tariffs would undermine the Act's tariff uniformity and reliability interests. First, the Motor Carrier Act of 1980, Pub. L. No. 96-196, § 4, 94 Stat. 794, 49 U.S.C. (Supp. IV) 10101(a), reduced any prior emphasis on rate uniformity by encouraging increased competition among carriers and the offering of a variety of quality and price options to shippers. Regarding rate bureaus specifically, Congress recognized that the bureaus promoted predictability in rates, but then deliberately took steps to inject more competitive pricing into the motor carrier rate system. H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27-28 (1980). Thus, the emphasis of the court of appeals on the importance of rate uniformity is inconsistent with the most recent expression of congressional policy.

Second, even if tariff uniformity were still a primary statutory goal, the rejection of effective tariffs after the full hearing contemplated by the Commission would not undermine that goal any more than would the complaint procedure accepted without question by the court of appeals (App., *infra*, 27a), because that procedure permits a challenge to motor carrier rates at *any* time under 49 U.S.C. (Supp. IV) 11701. Thus, carriers can never be certain that their rates will not be found unlawful or that they will not have to make refunds to shippers.

[13] In *Board of Trade* v. *ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981), the court held that the Commission must find unlawful any tariff developed in violation of rate bureau procedures. The court below, while

After careful consideration in the proceeding under review, the Commission concluded that rejecting tariffs that reflect clear violations of rate bureau agreements would be the most effective way to ensure compliance with these agreements. Rejection provides an immediate and narrowly focused administrative remedy. Its purpose is to prevent carriers from benefiting from improperly developed rates. It functions as a powerful deterrent to unauthorized collective behavior.[14]

The decision of the court below[15] denies the Commission the use of this highly effective tool for enforcing the statutory balance embodied in Section 10706, and makes it more likely that rates will be formulated in violation of rate bureau agreements. Accordingly, we ask the Court to grant certiorari to resolve the validity of the rate bureau rejection rule and to end uncertainty about the Commission's tariff rejection authority.

"not necessarily endors[ing]" the mandatory aspect of the Seventh Circuit's holding, agreed that the Commission should be concerned about the bureau's compliance with the agreements (App., *infra*, 25a n.22).

[14] Under the court of appeals' rule, however, the carriers could retain charges collected under rates that clearly violate bureau agreements (but are otherwise reasonable) unless a shipper or carrier sustains the difficult burden of showing actual injury.

[15] It should be noted that the court's holding affects not only motor carriers of property, but also motor carriers of passengers. The Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 10, 96 Stat. 1109, applies the provisions of Section 10706(b) to passenger motor carriers. In *Bus Rate Bureau Procedures*, Ex Parte No. 297 (Sub-No. 6) (ICC Mar. 8, 1983), slip op. 7-8, the Commission decided to apply the tariff rejection procedures to bus rate bureaus.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

OCTOBER 12, 1982

No. 80-7674

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS.

Before GOLDBOLD, Chief Judge, ANDERSON, Circuit Judge, and HOFFMAN*, District Judge.

GOLDBOLD, Chief Judge:

Petitioners[1] brought this action to challenge the validity of rules promulgated by the Interstate Commerce Commission implementing and interpreting recent statutory amendments to the provisions of the Interstate Commerce Act governing the antitrust exemption of motor carrier rate bureaus. We uphold the rules in large part but find one portion of the rules invalid for failure to comply with notice and comment procedures and another portion invalid as being in conflict with the statute.

I. INTRODUCTION

Since 1948 members of motor carrier rate bureaus have enjoyed antitrust immunity for their activities of collective-

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*Honorable Water E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

[1] Petitioners include all of the major motor carrier rate bureaus as well as three intervening petitioners representing shippers. We will not distinguish in text between petitioners and intervening petitioners.

ly submitting motor carrier rates[2] to the Interstate Commerce Commission. See Reed-Bulwinkle Act, 62 Stat. 472, codified at 49 U.S.C. § 10706. Rate bureaus traditionally perform two general functions: docketing and collective ratemaking. Broadly speaking, the docketing function involves informing bureau members and the subscribing public of proposed rates prior to submitting rates to the ICC. This provides other carrier bureau members an opportunity to engage in parallel behavior by joining in proposed rates if they wish. Also it provides advance notice to the shipping public enabling them to better object to the Commission if they find fault in a proposed rate. Collective ratemaking involves carrier members of the bureau meeting and conferring on what rates should be submitted to the ICC, creating essentially a forum for cartelization. Both activities are immunized from antitrust scrutiny by the rate bureau provisions of the Interstate Commerce Act, 49 U.S.C. § 10706(b).

Antitrust immunity is obtained by submitting a "rate bureau agreement" with the ICC for its approval, detailing the procedures of a bureau's operations and the rights of its members. Under the old provisions of the Act the ICC exercised sole discretion over the approval of rate bureau agreements. In § 14 of the Motor Carrier Act of 1980, however, Congress enacted a detailed set of statutory restrictions with which motor carrier rate bureaus must comply in order to obtain approval of their agreements from the ICC. 94 Stat. 793, 803, codified at 49 U.S.C. § 10706(b).

In August 1980 the Commission announced without prior notice an interim decision implementing and interpreting these new statutory provisions and inviting comments on the proposed rules. Motor Carrier Rate Bureaus—Implementation of P.L. 96-296, 45 Fed. Reg. 55734 (August 21, 1980). On December 30, 1980, the Commission announced its final decision, 46 Fed. Reg. 30092 (June 5, 1981). This

[2] The same antitrust exemption is available to rail carrier rate bureaus as well, see 49 U.S.C. § 10706(a), but the rules challenged here deal only with motor carrier rate bureaus. Therefore, reference to "rate bureaus" throughout refers to only motor carrier rate bureaus, and "carriers" to only motor carriers.

proceeding is a petition to review the final decision.[3] The rules announced in the final decision have not been codified in the Code of Federal Regulations but instead are in the form of a narrative description of the conditions and restrictions that must be contained in rate bureau agreements in order to obtain ICC approval. All rate bureaus are required to resubmit their agreements, modified to conform with the statutory provisions as interpreted in this decision.

II. STANDARD OF REVIEW

In order to establish the proper standard of review in this case it is necessary to determine whether the Commission's rules are legislative or nonlegislative.[4] Legislative rules are those that are promulgated pursuant to a Congressional delegation of power to issue rules and regulations that have the force of law. Valid legislative rules are

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[3] Petitioners brought this action initially to review the interim rules. We granted a stay of the interim rules pending our consideration of the case, and the ICC subsequently issued its final decision. As the final decision has superseded the interim action, the petition to review the interim rules is mooted and we therefore limit our review to the final rules. Hence, we find it unnecessary to grant the ICC's motion to dismiss the petition with respect to the interim rules.

[4] The following discussion is drawn from these sources discussing the distinction between legislative and nonlegislative (or "interpretative") rules, and the differing standards of review: *Batterton v. Francis*, 432 U.S. 416, 425-26 & n. 9, 97 S.Ct. 2399, 2405-06 & n. 9, 53 L.Ed.2d 448 (1977) ("Legislative ... regulations are 'issued by an agency pursuant to statutory authority.... Such rules have the force and effect of law.' ... By way of contrast, a court is not required to give effect to an interpretative regulation."); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 410, 50 L.Ed.2d 343 (1976); *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980); *Joseph v. U.S. Civil Service Commission*, 554 F.2d 1140, 1153 & nn. 24-26 (D.C. Cir. 1977); *Shell Oil Co. v. FPC*, 491 F.2d 82, 88 (5th Cir. 1974). *See generally* 2 K. *Davis, Administrative Law Treatise* §§ 7:8, 7:11 (1979) [hereinafter cited as *"Davis Treatise"*]; K. Davis, *Administrative Law of the Seventies* § 5:03, pp. 146-59 (1976) [hereinafter cited as *"Administrative Law of the Seventies"*].

As Davis notes, the distinction is "deeply established" in federal court jurisprudence and in administrative law theory. *Administrative Law of the Seventies*, *supra*, at 149-50; *Davis Treatise*, *supra*, at 37.

binding on the courts because they are the source of law that the court and agency must enforce. Legislative rules are valid unless "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Not all rules are of a legislative character, however. *See* the broad definition of "rule" in 5 U.S.C. § 551(a). Nonlegislative rules are those not promulgated pursuant to a power to issue regulations with binding effect; they are merely an expression of how the agency interprets and intends to enforce its governing statute, how it intends to exercise a discretionary function, or the procedure an agency intends to use in exercising its powers.[5] Nonlegislative rules do not have the same binding effect on the courts because they do not form the law which the courts enforce; the statute remains the source of the law. In the case of interpretative nonlegislative rules,[6] that is,

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[5] Even though an agency may not have delegated power to issue legislative rules it necessarily has implied power to issue nonlegislative rules if it is empowered to enforce the terms of a statute or to exercise a discretionary function, because in order to carry out these lesser duties it must instruct its staff as to how it interprets the statute and how the discretionary function is to be carried out. *Administrative Law of the Seventies, supra*, at 147.

[6] Most writers label the distinction drawn above in text as "legislative" versus "interpretative" rules. We prefer to use "nonlegislative" rather than "interpretative," because the latter label can be misleading. Not all nonlegislative rules interpret the statute. For example, an agency substantive direction to its staff on how to exercise a discretionary function or its rules prescribing procedures for carrying out agency functions may not purport to interpret the terms of the statute. Calling such rules "interpretative" can mislead because they are not necessarily reviewed under the same standard as are nonbinding rules that interpret a statute. (Discretionary functions, for example, are either reviewed for abuse of discretion, 5 U.S.C. § 706(2)(A), or not reviewable at all, *id.* at § 701(a)(2).) Also, the procedures for the issuance of noninterpretative rules may differ. See 5 U.S.C. § 553(b) (providing an exception to notice and comment procedures for interpretative rules but not for "discretionary rules").

Our prior caselaw has recognized that not all nonlegislative rules are interpretative. *See Brown Express, Inc. v. U.S.*, 607 F.2d 695, 700 n. 5 (5th Cir.).

We recognize, however, that the need to discuss this distinction usually arises in the context of interpretative rules, as is the case here,

rules that give the agency's opinion as to what the governing statute means, the rules are advisory only and the court is free to substitute its own judgment for that of the agency. 5 U.S.C. § 706 ("the reviewing court shall decide all relevant questions of the law [and] interpret statutory provisions"). Courts frequently, however, give great deference to an agency's nonbinding interpretative rules, upholding the rules if they are reasonable and consistent with past decisions. *See Davis Treatise, supra*, at §§ 7:13, 7:14. Thus, in practice it is often difficult, and frequently unnecessary, to determine which standard of review a court is applying.[7]

Here, however, it is necessary to determine whether certain of the Commission's rules are legislative or nonlegislative[8] because the standard of review normally applied to legislative rules is potentially altered in this instance by a recently added provision of the statute, which we now explain.

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and therefore we limit our discussion of nonlegislative rules to *interpretative* nonlegislative rules, particularly the proper standard of review and the required rulemaking procedures.

[7] Although the [distinction] is . . . clear . . . the courts do not always bring the [distinction] into bold relief in determining what degree of authoritative effect to give particular rules. The theory is often blurred. The main source of the blurring may be the frequent failure of agencies to make clear whether rules are issued pursuant to their power to make law through rules or whether they are merely making interpretations instead of exercising delegated power. When a court finds that it cannot readily answer the question whether or not the agency has intended to exercise delegated power, the court may skip that question and find another basis for decision, the rule may be clearly valid if it is legislative and it may be easy to adopt if it is interpretative, so that a classification of it may be unnecessary.

Davis Treatise, supra, at § 7:13, p. 61.

[8] This is true only with respect to the portions of the rules that concern the conditions for approval of rate bureau agreements, parts III, V, VI and VII *infra*, for it is only these portions of the rules over which there might be a significantly different standard of review. Other portions of the rules do not concern conditions of rate bureau agreement approval, *see* parts IV and VIII *infra*, and therefore are not affected by the presumption discussed below in text.

Congress in the Motor Carrier Act of 1980 intended to restrict significantly the discretion of the ICC to issue regulations enlarging on the motor carrier provisions of the Interstate Commerce Act. In its prefatory statement of findings and purpose Congress explained:

> the [ICC] should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; ... the [ICC] should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress.

Motor Carrier Act of 1980 § 3, 94 Stat. 793, *reprinted at* 49 U.S.C. § 10101 note. Congress carried out this purpose in different fashions in the various portions of the Act. For instance, concerning the issuance to motor carriers of certificates of authority to provide transportation service, Congress expressly withdrew a degree of rulemaking authority. *See* 49 U.S.C. § 10922(b)(3) ("The Commission may not make a finding relating to public convenience and necessity ... based upon general findings developed in rulemaking proceedings.") Concerning approval of rate bureau agreements, however, Congress did not withdraw rulemaking authority but tempered that authority by creating a presumption that any additional rules are unnecessary. Under the prior provisions there were virtually no statutory conditions to the approval of a rate bureau agreement. Instead the ICC was given broad discretion to approve agreements "when it finds that the ... agreement will further the [national] transportation policy," *see* 49 U.S.C. § 10706(c) (now applicable only to non-rail and non-motor carriers), and was given broad power to require compliance with conditions it considered necessary to further that policy. Under the new provisions, Congress has established a detailed set of conditions for approval and has instructed that a rate bureau agreement "*shall be approved* by the Commission upon a finding that the agreement fulfills each requirement of [the statute], *unless* the Commission finds that such agreement is inconsistent with the [national] transportation policy." 49 U.S.C. § 1076(b)(2)

(emphasis added). Congress explained in the legislative history the meaning of this change in emphasis:

> Under the [old] statutes, the [ICC] has substantial discretion in approving or disapproving rate bureau agreements.... [The new statute] is a clear example of Congress defining the limits which it believes the Commission should follow [and] reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the [statute], there is a presumption that the Commission should find the agreement to be in the public interest.

H.R. Rep. No. 1069, 96th Cong., 1st Sess. 27, 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2309, 2311.

Contrary to petitioners' contentions, then, the Motor Carrier Act of 1980 has not virtually eliminated the ICC's legislative rulemaking authority over rate bureau agreements. The ICC retains the power to impose new conditions to further the national transportation policy. As the Commission concedes, though, "[i]t is apparent that a substantial change in the burden of proof associated with the approval of rate bureau agreements has been mandated by Congress." 46 Fed. Reg. 30093. The Commission's legislative power to prescribe additional conditions for agreement approval has been tempered with the presumption that new conditions the Commission imposes are unnecessary. This presumption is relevant to our standard of review as follows: If the Commission does not purport to exercise its independent rulemaking authority to create additional conditions but merely seeks to enforce the terms of the statute as it interpets them, then it has issued nonbinding, interpretative rules. The statutory terms remain the ultimate source for the duty imposed on the rate bureaus, and we are free to arrive at our own interpretation of those statutes, giving appropriate deference to the agency's reviews. If, however, the Commission purports to exercise its delegated authority to create new conditions that have the force of law, then the presumption described above attaches, for the Commission is going beyond the terms of the

statute when its own rules are the source of the duty imposed on the rate bureaus.[9]

We must determine, then, the character of the Commission's rules. The essence of the distinction between legislative and nonlegislative rules is the power the agency chooses to exercise in promulgating its rules. If it exercises its delegated power to make rules having the force of law, then the rules are legislative. Thus, we will listen carefully to the statements of the agency in its decision[10] and will honor its characterization if it reasonably describes what the agency in fact has done. *Administrative Law of the Seventies, supra*, at 148. Here the Commission's purpose was to interpret and implement the 1980 Act, not to impose new conditions that go beyond the Act. In its interim notice of rulemaking the Commission stated that "[i]n this proceeding the Commission will interpret and implement [the] new [statutory provision]." 45 Fed. Reg. 55734. The Commission intended the statute to be the sole source of duty. In its final decision the Commission ordered motor carrier rate bureaus to "file new or amended agreements *in conformity with the act as we have interpreted it* in this final decision." 46 Fed. Reg. 30093 (emphasis added). Nowhere does the Commission refer to its broad rulemaking authority or purport to create new law. Thus, it is clear that the Commis-

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[9] The precise effect of this presumption on our standard of review is unclear. Application of presumptions and burdens of proof in a legislative, rulemaking context is awkward and problematic because these are concepts developed in an adjudicative, factfinding context. *Cf., e.g.*, 49 U.S.C. § 10922(b)(1) (similar presumption applied in decision to issue motor carrier certificate of authority, but ICC prohibited from making decision in rulemaking). Possibly we would be essentially required to abdicate our normal "arbitrary and capricious" standard of review in which we defer to the rational conclusions and findings of the agency and would be required ourselves to weigh competing policies and to decide what is necessary to further the national transportation policy. Fortunately, we are not required to resolve how this presumption applies to rulemaking, for, as discussed below, we find that the Commission's rules that impose conditions on rate bureau agreements are not legislative rules and do not go beyond the statutory conditions.

[10] Post hoc statements of counsel are much less persuasive. *Administrative Law of the Seventies, supra*, at 148.

sion did not intend to issue new conditions with the force of law but was merely interpreting the statute, with the statute remaining the source of law. As discussion of the particular rules will disclose, this accurately reflects what the Commission in fact did. See parts III, V, VI and VII, *infra*. Therefore, our standard of review is to determine whether the Commission's interpretation of the statute is correct, giving appropriate deference to its considered judgment and expertise. The presumption discussed above does not apply because the Commission has not attempted to go beyond the statutory conditions.

In making this determination that the Commission has not exercised its legislative rulemaking power we do not consider as conclusive the fact that the rules are phrased in mandatory terms. The Commission is charged with enforcement of the statute, and therefore it naturally instructed the rate bureaus as to their duties under the statute. Such mandatory instructions are not binding on the courts, however, if they merely interpret and implement the statute and do not create new law. Also, that these rules might have a substantial impact does not necessarily constitute them legislative rules. Nonbinding interpretations may have great impact and still remain nonlegislative. *Davis Treatise, supra*, at § 7:16; *Joseph, supra*, 554 F.2d at 1153 n.26; *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1094-95 (Emer. Ct. App. 1978).[11] In short, the essential inquiry is what the agency intends to do, for if it chooses to exercise its legislative rulemaking

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[11] It is a helpful aid, but not determinative, that the rules are phrased in an interpretative fashion. This is not conclusive because legislative rules may in a sense interpret the statute. For instance, if an agency is delegated the authority to issue binding interpretations of a statutory term or phrase, it may issue legislative rules that in a broad sense interpret the statute. *See, e.g., Batterton v. Francis*, 432 U.S. 416, 425-26, 97 S.Ct. 2399, 2405-06, 53 L.Ed.2d 448 (1977) (legislative rule interpreting "unemployment"). Moreover, even if an agency is not specifically authorized to issue binding interpretations, it may be possible for an agency to do so under its general rulemaking power, if it so chooses.

power, then that is what it has done.[12] Only with this determination made may we precisely review the substantive validity of the rules and the validity of the procedures used in their promulgation.

III. THE INDEPENDENT ACTION RULE

Rate bureaus deal with two types of rates, individual and collective, distinguished according to whether the rate is proposed unilaterally by an individual carrier or whether it is proposed after consultation among a group of carriers. If an individual rate is docketed with a rate bureau, that is, circulated among the subscribing public and carrier members prior to the bureau's filing the rate with the ICC, then independent action is potentially converted effectively into collective action because other carriers are given an opportunity to join in on the rate.

The statute provides that a bureau "may not interfere with each carrier's right of independent action." 49 U.S.C. § 10706(b)(3)(B)(ii). In implementing this statutory requirement the ICC ruled that rate bureaus cannot require members who file their rates on bureau tariffs[13] to docket those rates with the bureau; otherwise there would be interference with the right of independent action. Thus, the Commission required that rate bureaus agree to allow members who file rates through the bureau to dictate whether or not they also want their rates circulated among other members prior to filing with the ICC. 46 Fed. Reg. 30093-97.

To understand the precise impact of this rule one must realize that unquestionably a bureau member has the right

[12] Of course, the substance of the rule is not irrelevant to making this determination. The agency's characterization must reasonably comport with what it has in fact done. If, for instance, a rule creates a new duty that is not plausibly an interpretation of the statute, then it can only be considered a legislative rule. *See, e.g., Chamber of Commerce v. OSHA, supra*, 636 F.2d at 469. Also, we might find unconvincing an assertion that a rule is interpretative if it relates to broad terms of a governing statute whose meaning Congress meant to be articulated through legislative rulemaking, such as an "interpretation" of "reasonable rates."

[13] A tariff is a schedule of rates.

to bypass bureau procedures by filing its rates on its own tariff without the assistance of the bureau and without bureau docketing. Also, a carrier unquestionably has the right to compel bureau filing without obtaining bureau approval of the rate. What the Commission has decided, though, is that a bureau member also has the right to file its rates on bureau tariffs without giving other carriers an opportunity to participate in the rate.

The Commission's rationale for this interpretation of the unfettered right of independent action is that it will provide an incentive to decrease rates. Under the rule a carrier can decrease its rates with greater lead time over competing carriers and enjoy a limited period of competitive advantage because there is no advance notice of the proposed rate decrease through docketing. Without the rule a proposed rate decrease could be joined in by other carriers before it is filed with the ICC, and thus the initiating carrier would lose any competitive advantage or incentive to decrease rates.

The strongest challenge to the independent action rule comes from shippers who contend that it allows carriers to hide rate *increases* from the shipping public by burying them in the lengthy and complicated bureau tariffs and thus permits carriers to enjoy a period of supracompetitive pricing. These petitioners reason forcefully that when a rate increase is filed in a bureau tariff it is contained in thousands of pages of poorly organized tariff material that are impossible to survey in the 30-day waiting period before rates become effective. Thus, shippers are not aware of the increases before they take effect, with the result that they lose the opportunity to have the Commission reject or suspend and investigate the rate. Shippers might also endure supracompetitive charges for a period before they have an opportunity to locate another carrier. These petitioners observe that if a rate increase is docketed there is a longer notice period and the form of the notice is clearer, better organized and more accessible. Even without docketing, if a rate increase is filed in an individual carrier's tariff it will be more accessible because it is not buried in the thousands of pages of other bureau material.

In making its decision the Commission recognized the anti-competitive disadvantage from rate increases but concluded that the disadvantages would be outweighed by the competitive advantages from rate decreases. The Commission reasoned that the shippers' fears were largely unfounded. According to the Commission, with competitive conditions in the industry carriers will realize that it is not advantageous to disguise rate increases in order to obtain a short period of supracompetitive prices because the shipper, once it discovers the increase, will then shift to another carrier. *Id.* at 30096-97. Moreover, the Commission expressed its intention "to monitor independent action docketing practices closely and take any necessary action if we detect a consistent pattern of noncompetitive behavior." *Id.* at 30096.

As outlined above, the Commission's independent action rule is but an interpretation of the statutory right of independent action. Thus, we are free to reach our own conclusion of the meaning of this phrase, 5 U.S.C. § 706, but we will give appropriate deference to the agency's conclusion. The degree of deference we give varies according to the strength of several factors. *See Batterton v. Francis*, *supra*, 432 U.S. at 425 n.9, 97 C.Ct. at 2405 n.9; *General Electric Co. v. Gilbert*, *supra*, 429 U.S. at 141-42, 97 S.Ct. at 410-11. We will give greatest deference to a reasonable interpretation that was reached after thorough consideration of the competing theories, that is consistent with the legislative history, that was rendered contemporaneously with the enactment of the statute by an agency charged with the enforcement of the statute, that is enforced consistently, and that concerns a matter of expertise or specialized knowledge peculiarly within the competence of the agency. *See generally*, cases collected in *Comment*, 47 U.Chi.L.Rev. 771, 786-87, 789-91 (1980). Under this standard the ICC's interpretation of the right of independent action is entitled to a good degree of deference.

The right of independent action was contained in the original Reed-Bulwinkle Act. In the 1950's the ICC issued several opinions to the effect that a waiting period before filing a proposed rate through bureau tariffs, designed to

allow competing carriers to make concurrent rate adjustments, is advisory only and not mandatory. *Intercoastal Steamship Freight Association—Agreement*, 297 I.C.C. 759, 762 (1956); *Southern Motor Carriers—Agreement*, 297 I.C.C. 603, 609-10 (1956); *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773, 778-79 (1957). Therefore, the Commission's position is consistent with its past position, reached early in its enforcement of the antitrust immunity provisions.[14]

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[14] We recognize that the Commission's position concerning a mandatory, pre-filing waiting period has not always been consistent. Prior to its 1956 and 1957 decisions the Commission expressly rejected the contention that mandatory notice to other carriers conflicts with the right of unrestrained independent action. *Tobacco Transporters Freight Traffic Agreement*, 288 I.C.C. 517, 520 (1953). (The Commission's attenuated explanation that *Tobacco Transporters* is consistent with the present interpretation is unconvincing. The cases it points to for reconciliation—*Western Traffic Ass'n—Agreement*, 276 I.C.C. 183, 210 (1949), and *Central States Motor Freight Bureau, Inc.—Agreement*, 278 I.C.C. 581, 584 (1950)—decided only that a bureau may not require a carrier to obtain bureau *permission* before filing, and do not directly address the issue of prefiling notice to other carriers and a waiting period.) Moreover, the Commission acknowledges that carriers have seldom, if ever, exercised their right to file rates through the bureau without docketing, 46 Fed. Reg. 30096, and the Commission continued to approve rate bureau agreements requiring docketing with only an "understanding" that this mandatory language is advisory.

Nevertheless, petitioners point to no Commission decision subsequent to the 1956 and 1957 cases that contradict its interpretation. Thus, we conclude that although the interpretation has not received continuous and longstanding enforcement, it is not inconsistent with the previous position.

Petitioners also object that the ICC's rule flatly contradicts a codified regulation that they read to require docketing of independent actions. 49 C.F.R. 1331.5 states:

> When independent action is announced and tariff publication is to be made by a [rate bureau], notification thereof will be given by the [bureau] to the same extent and in the same manner that the [bureau] gives notice of [collective] actions....

The purpose of this rule was to require rate bureaus to give notice to the shipping public of independent actions, as they were already required to do so of collective actions, because notice to the shipping public was deemed essential for collective actions and docketed independent actions have the potential of taking on the character of collective actions. *See Notice of Independent Action*, 332 I.C.C. 22 (1967). Thus, the Commission in its decision construed this regulation to apply

Second, the independent action rule was issued after thorough consideration of the competing considerations. *See* 46 Fed. Reg. 30093-97. Although the Commission's resolution of these competing policies is not free from doubt, its conclusion is not unreasonable. In particular, petitioners' contention that the rule should be limited to rate decreases in order to avoid the anticompetitive disadvantages from rate increases is not compelling. The Commission reasonably concluded that if the right of independent action includes the right to not docket rate decreases, it logically must also include the right to not docket rate increases, for the statute does not distinguish between the two types of actions. *Cf. Arizona v. Maricopa County Medical Society*, ___ U.S. ___, ___, 102 S.Ct. 2466, 2475, 73 L.Ed.2d 48 (1982) (maximum price fixing is on the same legal, even if not same economic, footing as minimum price fixing).

Third, the interpretation is a valid construction of the statute and comports with general Congressional intent. Requiring carriers who undertake independent action through bureau filing to docket their rate proposals is reasonably viewed as a restriction of the freedom of independent action. Clearly the rule increases the prerogative of the independent actor. Congress considered the statute a "strict limitation upon rate bureau treatment of independent actions," H.R. Rep., *supra*, at 30, 1980 U.S. Code Cong. & Admin. News at 2312, and its general purpose in § 14 of the Act was to increase restrictions on rate bureaus by limiting the opportunities for collective rate-making and by encouraging more independence in formulating individual rates.

Finally, the Commission's decision was issued contemporaneously with the 1980 recodification and reemphasis of the right of independent action, and the operation of rate

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only where an independent action is docketed; in such a case, notice must be given equally to shippers as to other carriers. 46 Fed. Reg. 30095. Where independent action is not docketed, there is no opportunity for the rate to become collective action, and therefore the regulation does not apply. Thus construed, the regulation is not inconsistent with the independent action rule. The Commission's interpretation of its own regulation, to which we give particular defence, is reasonable, for the regulation applies by its own terms only when an independent action "is announced," i.e., docketed.

bureaus and the competitive conditions of the transportation industry are matters within the special expertise of the ICC. In short, we find no compelling reason to depart from the Commission's interpretation.

IV. SPECIAL PERMISSION AUTHORITIES

49 U.S.C. § 10762(c)(3) requires that a proposed rate change filed with the ICC not become effective until 30 days after the rate is filed, published, and held open for public inspection. This mandatory 30-day waiting period may be reduced by the Commission, however, "if cause exists." *Id.* at § 10762(d)(1). A finding of cause is known as a "special permission authority." In the past the ICC regularly issued standing special permission authorities to rate bureaus, which allowed their members to enforce on only five days notice rate reductions designed to meet reductions established by the independent action of other bureau members. If this practice were continued bureau members could avoid the purpose of the independent action rule by filing matching rate reductions that take effect within only five days, depriving an initiating carrier of most of its competitive advantage. Therefore, the ICC cancelled all existing special permission authorities of this nature and made clear that they would no longer be issued. 46 Fed. Reg. 30096, 30106.

This action is challeged on the ground that it was taken in violation of the Administrative Procedure Act's requirement that notice and an opportunity to comment on proposed rules be given before the rules are adopted. 5 U.S.C. § 553(b). The ICC indeed gave no notice that it intended to change its past practice concerning these special permission authorities.[15] Its only justification[16] is that because it may

[15] The ICC contends that notice of the rule was given because cancellation of the authorities was necessarily inherent in allowing independent carriers to file without advance notice. No mention was made of the matter of special permission authorities,, however, only of the docketing procedure. Therefore, the Commission's notice did not "fairly appraise interested persons" that this action was being considered. *See Bonney Motor Express, Inc. v. U.S.*, 640 F.2d 646, 650 (5th Cir. 1981).

[16] 5 U.S.C. § 553(b)(B) provides an exception from notice and comment procedures "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules

cancel the discretionary authorities informally and without a hearing, it need not undertake rulemaking procedures. In essence, the Commission's contention is that its decision was not a rule of general and prospective application but instead a series of decisions in discrete cases to cancel, all taken at the same time.

While a decision in a particular case or cases to revoke a special permission authority would not be rulemaking, the decision to reverse a longstanding and uniform practice by revoking all outstanding authorities of a particular type and implicitly indicating that no such authorities will be issued in the future is clearly a rule. Such a decision is, in the terms of the Administrative Procedure Act, "an agency statement of general ... applicability and future effect designed to implement ... or prescribe law." 5 U.S.C. § 551(4). In *Brown Express, Inc. v. U.S.*, 607 F.2d 695, 699-702 (5th Cir. 1979), the former Fifth Circuit held that where the ICC announced that it would discontinue its long-standing informal practice of giving competing carriers notice before issuing emergency temporary operating authority, the agency had engaged in rulemaking that required notice and comment. This is a similar case, and the fact that the prospective announcement affects a discretionary function does not deprive it of its rulemaking quality. It is rulemaking both because an informal rule established by long-standing practice was rescinded, that of routinely granting the special permission authorities described, and because a new rule was announced, that of not issuing authorities that would allow competing carriers to frustrate the competitive advantage gained from independent action without docketing. Therefore, the rule is invalid for failure to comply with the APA's notice and comment provisions.

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issued) that notice and [comment] are ... unnecessary...." Because the issues concerning special permission authority revocation appear to be identical to the issues concerning the independent action rule, and because parties had an opportunity to file objections in reconsideration of the ICC's decision but failed to do so, the Commission might have contended that this rule falls within the good cause/unnecessary exception. It makes no such contention at this point, however, and so we are not called upon to rule on the availability of this exception.

V. INDUSTRY AVERAGE COSTS

The most fundamental change in rate bureau practices accomplished by the Motor Carrier Act of 1980 was to place two primary restrictions on collective ratemaking activities. First, effective January 1, 1981, no carrier may *vote* on a rate proposal unless that carrier is authorized to provide the transportation service,[17] 49 U.S.C. § 10706(b)(3)(B)(i)(II), although any carrier may continue to *discuss* any rate proposal, *id.*, at § 10706(b)(3)(B)(i)(I). The second restriction, which takes effect January 1, 1984,[18] is that there can be *no discussion or voting* on "single-line rates." *Id.* at § 10706(b)(3)(D). "Single-line rates" are rates proposed by a single motor carrier applicable only over its line. *Id.* at § 10706(b)(1). Single-line rates are distinguished from "joint-line rates," which are rates that apply over the lines of two or more carriers, made by agreement between the carriers. 49 C.F.R. § 1310.0(f)(16) (1981). There is an important exception to these two restrictions. Changes in tariff structures and general rate increases or decreases do not fall within these two restrictions if discussion of such changes or rates is limited to "industry average carrier costs" and after 1984 if discussion does not include "individual markets or particular single-line rates." *Id.* at § 10706(b)(3)(D)(i) and (iii).

The Commission ruled that "general rate increases and decreases[19] may be discussed and voted on only if . . . dis-

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[17] The requirement for voting is not that the carrier actually participate in the rate but only that it is authorized to provide the service.

[18] The effective date is potentially delayed until July 1, 1984 under certain conditions. *See* 49 U.S.C. § 10706(b)(3)(D).

[19] The Commission defined "general increase" as "a proposed general adjustment of substantially all the rates published in a *rate bureau's* tariff or tariffs." Such a definition does not appear to comport with Congressional intent, however. Congress defined general rate increases or decreases as those rate changes "that are applicable to all rates charged by *one or more carriers*." H.R. Rep., *supra*, at 28, 1980 U.S. Code Cong. & Admin. News at 2310. It is clear that Congress envisioned "general rate changes" and "single-line rates" as overlapping concepts, for it stated that "the bill recognized that general rate increases are applicable to single-line rates as well as joint-line rates."

cussion is limited to industry average carrier cost information." and that "discussion of changes in tariff structure . . . is limited to industry average carrier cost information." 46 Fed. Reg. 30103. Two objections are made to this rule. First, some petitioners contend that because the voting and discussion restrictions to which the tariff restructuring and general rate change exception applies do not take effect until 1984, the exception and accompanying industry average costs limitation do not take effect until then. This is clearly incorrect for only one of the two restrictions on collective ratemaking is delayed until 1984. The restriction on voting to those authorized to provide the service affected is effective now, and so must be the exception.

The second challenge is that it is illogical and absurd to limit discussion to industry average costs. Petitioners contend that the statute means that *when* costs are discussed only industry average information may be used, but that the statute could not mean that only cost information may be discussed. A host of factors are relevant to general rate changes such as the demand for services and shippers' ability to pay; moreover, tariff restructuring may not involve cost of revenue information at all where it is undertaken only to simplify the tariffs and not to change the rates.

Despite the apparent strength of this argument the industry average cost rule is valid. First, the rule simply tracks the language of the statute, and it would be anoma-

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Id. Thus, by creating the exception to single-line rates for general rate changes, it appears Congress meant to impose greater restrictions on "specific" or "individual" single-line rates than on "general" single-line rates. This reading is supported by the statute, where Congress allowed discussion of general rate changes so long as "*particular* single-line rates" are not discussed, 49 U.S.C. § 10706(b)(3)(D)(i), and in the legislative history where the House Report refers to "*specific* single-line rates" and "*individual* single-line rates."

In short, both the Commission and Congress agree that a rate change is "general" only if it affects all commodities. The Commission evidently believes, though, that a change is general only if it also affects substantially all bureau rates, while Congress evidently viewed general rate increases as potentially affecting only a single carrier. Because this issue has not been raised by petitioners, however, we do not definitvely rule on it. We discuss the issue only because it is helpful to an adequate understanding of these intricate statutory provisions.

lous indeed to strike down a rule that only attempts to implement the precise wording of the governing statute, the validity of which has not been challenged. If application of the statute produces absurd results in some situations, this is not a concern at this point, but is a matter to be addressed on a case-by-case basis as the meaning of the statute is fleshed out. *Cf. American Trucking Association, Inc. v. ICC*, 659 F.2d 452, 461 (5th Cir. 1981) ("[w]e ... decline to hypothesize such possible consequences of the rules should they be so applied"). Second, the Commission's interpretation of the statutory language may not be as harsh as petitioners fear. In its decision the Commission stated that "some of the topics of discussion [other than costs] suggested by the Rate Bureaus, such as the need for an increase or its lawfulness, would be inextricably involved in a full discussion of costs." 46 Fed. Reg. 30103.

Finally, the limitation on discussion to industry average costs is not manifestly unduly restrictive because it does not apply to every general rate change or tariff restructuring. It only applies to the extent that the bureau seeks to come within the exception to one of the two limitations on collective ratemaking. For instance, if a general rate increase is proposed that is not a single-line rate and voting is limited to those carriers authorized to provide the service affected, then neither of the two statutory restrictions applies and therefore it is not necessary to meet the limitation within the exception to the two restrictions. A second example where the exception might not be necessary is a tariff restructuring that does not change the substance of any rates, because the two restrictions on collective ratemaking apply only to "single-line *rates*" and "*rate* proposals."

For these reasons we find nothing unreasonable in the Commission's decision to implement directly the wording of the statute.

VI. SOUND RECORDINGS

The statute provides that a rate bureau "must admit any person to any meeting at which rates or rules will be discussed or voted upon." 49 U.S.C. § 10706(b)(3)(B)(v). Con-

gress stated that this "provides for total sunshine on discussion and voting." H.R. Rep., *supra*, at 30, 1980 U.S. Code Cong. & Admin. News at 2312. The Commission ruled that "admission to meetings cannot be contingent upon compliance with any conditions or procedures. Thus, the unconditional right to attend meetings ... includes the right to take notes or use recording devices provided the conduct of the meeting is not disrupted." 46 Fed. Reg. 30099.

The Commission reasonably read the statute to impose an unconditional right to attend, for Congress characterized the statute as a "total sunshine" law. Banning any sound recording would be a condition on the "total sunshine" concept. The Commission's rule is a natural and logical extension of the unchallenged rule that the right to attend includes the right to take notes. This interpretation was contemporaneous to the enactment of the statutory requirement of open meetings, which the Commission must enforce. Thus, there are sufficient factors present for us to defer to this interpretation.

VII. CHANGES IN RELEASED RATES

There exists a category of rates known as "released rates" that charge a lesser rate in exchange for a limitation or "release" of the carrier's normal liability for damage to commodities carried. 49 U.S.C. § 10730. The Motor Carrier Act of 1980 banned discussion or voting on released rates but created an exception for "change" to existing released rates; such changes may be discussed or voted on until January 1, 1984. 49 U.S.C. § 10706(b)(3)(C). The statute and the legislative history do not define what is a change in an existing released rate and what is a new released rate. Without giving notice that it was considering this subject matter the Commission issued in its final decision the interpretation that only a change in the amount charged is a change to an existing rate within this exception, and that changes in the geographic or commodity coverage of rates are not changes to existing rates but are new released rates. 46 Fed. Reg. 30104.

Petitioners challenge this rule first on substantive grounds. They contend that the rule is unreasonably restrictive because it prohibits collective geographic and commodities changes of even a trivial or minor nature. We choose to defer to the Commission's interpretation. First, it is a contemporaneous construction of the statute that the Commission is empowered to enforce, and it concerns a matter within the Commission's particular expertise—the concept of what a rate is. Second, the interpretation does not appear to be unreasonable. Clearly, any change in the amount charged is merely a change in an existing rate. However, if carriers were allowed to freely make collective, large-scale changes to the commodities and territory affected by a released rate, they could easily circumvent the prohibition. Third, the interpretation is not unduly restrictive as applying to even trivial changes, for in its brief to this court the Commission construes its decision as applying to "new routes" and "substantial revisions."

Petitioners also challenge the lack of notice and opportunity to comment required by the APA, 5 U.S.C. § 553(b), (c). An exception to the notice and comment procedures exists, though, for "interpretative rules, general statements of policy, or rules of agency ... procedure." *Id.* at § 553(b)(B). We find that the released rate rule falls within the "interpretative" exception because it is a nonlegislative rule that interprets the statute and it does not have a "substantial impact."

As discussed earlier in this opinion, rules that in some sense interpret the statute might be either legislative and therefore binding on the parties and the courts, or nonlegislative and therefore only advisory (but entitled to deference), depending on whether or not the agency has chosen to exercise its delegated power to issue rules with the force of law. Earlier this distinction was used to determine the proper substantive standard of review. This distinction also determines whether a rule is "interpretative" for purposes of the exception to the notice and comment requirements of the APA. In *Brown Express, supra*, 607 F.2d at 700, the former Fifth Circuit contrasted interpretative rules within the exception with "legislative rules ... which create law."

The legislative/nonlegislative distinction has been employed in several other cases for defining the extent of the interpretative rule exception. *See, e.g., Batterton v. Marshall, supra*, 648 F.2d at 702-09; *Chamber of Commerce v. OSHA, supra*, 636 F.2d at 468-71; *Joseph, supra*, 554 F.2d at 1153 & nn.24-26. This is a sensible fashion in which to interpret the exception, for where rules that in some sense interpret the statute are issued as legislative rules parties affected should have prior opportunity to comment on them because they and the courts will be bound by them. By contrast, nonlegislative inperpretative rules are advisory only (although due some deference) and may be challenged by the parties in court. Therefore, there is not the same need for a prior opportunity to comment. *See Chamber of Commerce v. OSHA, supra*, 636 F.2d at 470-71. *Cf. Comment*, 43 U. Chi. L. Rev. 430, 446-47 (1976).

As discussed above, the released rate rule is nonlegislative, *see* text at note 10 *supra*, and it is clearly an interpretation of the statute. Therefore, it falls within the primary definition of an interpretative rule.

Despite the interpretative nature of a rule many courts have enforced notice and comment procedures where the rule has "substantial impact." *See* discussion and cases collected in *Davis Treatise, supra*, at § 7:17. This court has never expressly endorsed the substantial impact approach to interpretative rules, although we have applied it to procedural rules, the third in the trio of exceptions, *Brown Express, supra*, 607 F.2d at 701-02, and courts usually do not distinguish among these three exceptions for purposes of the substantial impact test, *see Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F.Supp. 1330, 1335 n.7 (E.D. Tex. 1981). There are significant theoretical difficulties in applying the substantial impact test, however,[20] and

[20] The substantial impact test is typically reasoned under two different theories: as a gloss on the statutory exception for "interpretative" rules, the *statute* requires notice and comment even though a rule is "interpretative" if it has substantial impact; as a judicially-created procedural requirement, notice and comment procedures are imposed *in addition to* the requirements of the APA if demanded by fundamental fairness. *See Davis Treatise, supra*, at § 7:18. The first theory has

therefore we avoid endorsement of it at this time. Instead, we assume *arguendo* that this approach is applicable and find that the released rate rule does not have substantial impact for purposes of notice and comment.

Petitioners have not shown the Commission's interpretation of the released rate provision to have the type of substantial impact that courts have previously found required notice and comment. First, the rule is a fresh interpretation of a new statutory provision and therefore is not a "depart[ure] from existing practice." *Brown Express*, *supra*, 607 F.2d at 702. Some interpretation of the statute is necessary, and the Commission has simply chosen one of several possible interpretations; petitioners do not contend that their preferred interpretation is a radically different one. Also, petitioners have not explained in concrete terms what effect the interpretation has on them. We do not know how many released rates there are, how important these rates are to the operation of carriers, or the significance of the difference between changing these rates by independent action rather than by collective action. From the material before us the matter seems much less significant than other issues in this case, for all that is at stake is the extent

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been criticized as unsound. *Id.*, 1982 Supplement at 127 (criticizing *Brown Express*, *supra*); *Administrative Law of the Seventies*, *supra*, at 193. The second theory is put in doubt by the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978), where it stated that courts may add on to the APA procedural requirements only in "extremely rare" or "extremely compelling" cases. *See Energy Resources Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1096-98 (Emer. Ct. App. 1978) (holding that *Vermont Yankee* precludes substantial impact test); *Davis Treatise*, *supra*, at §§ 6:35-36, 7:19, and 1982 Supplement at 127-47 (attempting to write off the *Vermont Yankee* "dictum").

In addition to the two principal theories it is also possible that the substantial impact test is not distinct from the initial determination of whether a rule is "interpretative" but is subsumed within this determination as a factor in determining whether a rule is "legislative." *See* discussion in text preceding note 11 *supra*. If this is the only role of the substantial impact test it has a much decreased significance, for as explained above the substantial impact of a rule is only one, weakly relevant consideration in the legislative rule determination. *Id.*

to which carriers may collectively as opposed to independently change existing released rates until January 1, 1984; after this date the rule becomes irrelevant because all collective activity concerning released rates is prohibited. In sum, there has been no demonstration that the rule "drastically effect[s] vital interests," *Administrative Law of the Seventies*, *supra*, at 194, or otherwise has the type of impact that requires notice and comment.

VIII. ENFORCEMENT

The ICC ruled that it will enforce the rate bureau provisions by rejecting bureau tariffs where there is "proof of significant violations" of an approved agreement and by suspending and investigating rates where there are "allegations of lesser violations." 46 Fed. Reg. 30105-06. The recently-established employee board known as the Tariff Integrity Board ("TIB"), *see* 49 C.F.R. § 1100.22a, will entertain all allegations of rate bureau agreement violations.[21]

Petitioners first assert that the Commission may enforce the rate bureau provisions only by terminating approval of the agreement and not by finding unlawful rates issued in violation of the agreements. They rely on *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922), which held that the ICC may not award damages for carrier violations of the antitrust laws if their rates otherwise complied with the Interstate Commerce Act. *Keogh* does not prevent the Commission's enforcement scheme. When *Keogh* was decided the Reed-Bulwinkle Act had not been enacted, and therefore the Commission was attempting to enforce only the antitrust laws, a matter not within its delegated powers. By contrast, here the Commis-

[21] In its final decision the Commission originally stated that the TIB would forward complaints to the Office of Consumer Protection for investigation, and then "may act" after receiving the results of the investigation, or may send its recommendation to the Commission for possible action. 45 Fed. Reg. 30106. In its "Clarification and Errata," however, the Commission deleted the quoted language and apparently restricted the TIB's role to only that of recommending action to the Commission. *Id.* at 30108-09.

sion is enforcing only the provisions of the Interstate Commerce Act, which it is broadly empowered to do. 49 U.S.C. § 10321(a). That one means of enforcing the rate bureau provisions is specified in the Act—termination of agreement approval—does not itself preclude other means, for "enumeration of a power of the Commission . . . does not exclude another power the Commission may have in carrying out [the Act]." *Id.*[22]

Petitioners next contend that although the Commission might be able to find rates unlawful for failure to comply with rate bureau agreements, it may not do so under the rejection power, because that power is reserved solely for technical defects in filing formalities, such as the failure to properly symbolize rate changes. Although filing defects are the primary focus of the rejection power, *see* 49 U.S.C. § 10762(e); *Southern Motor Carriers Rate Conference v. U.S.*, 676 F.2d 1374, 1376 (11th Cir. 1982) (discussing rejection for publication errors), courts have frequently held that the power is not strictly limited to these defects. The seminal case is *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972), whose reasoning we adopt here:

> [Rejection] is a peremptory form of response to filed tariffs, . . . appropriate where the filing is so deficient on its face that the agency may properly return it to the filing party without even awaiting a responsive filing by any other party in interest. . . . Its use is not limited to defects of form. It may be used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket. . . . [A]

[22] Our conclusion is supported by the Seventh Circuit's recent decision in *Board of Trade v. ICC*, 646 F.2d 1187, 1192 (7th Cir. 1981), holding that the Commission must find that a rate is unlawful if published in violation of the rate bureau agreement. Although we do not necessarily endorse the mandatory aspect of this holding, the court's reasoning demonstrates, as we have concluded, that compliance with the agreement is a proper subject for Commission consideration in reviewing the legality of rates.

> rate filing may be rejected both when the governing statute explicitly provides for rejection and when it does not. The Commission ha[s] authority to issue a regulation ... for the rejection of filings that patently fail to establish substantial compliance with [the Act and] duly issued regulations. This rests on its basic statutory authority to issue regulations ... to carry out the provisions of the Act.

Accord, United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332, 347, 76 S.Ct. 373, 382, 100 L.Ed. 373 (1956) ("There can be no doubt of the authority of the Commission to reject [an] unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act.'"); *North Central Truck Lines, Inc. v. ICC*, 559 F.2d 802, 804-05 (D.C. Cir. 1977); *Delta Airlines, Inc. v. CAB*, 543 F.2d 247, 264 (D.C. Cir. 1976); *W.J. Dillner Transfer Co. v. U.S.*, 214 F. Supp. 941, 946 (W.D. Pa. 1963).[23]

Petitioner's third line of attack is a successful one. The Tariff Integrity Board procedures which the Commission invoked allow for the rejection or suspension and investigation of tariffs after the tariffs become effective.[24] In *Southern Motor Carriers, supra*, we considered a challenge to the TIB procedures and held that the Commission may not reject tariffs after they are effective using the TIB "informal complaint" procedures.[25] Thus, we reserved the

[23] So long as rejection is exercised before the tariff becomes effective the principal concern is only a procedural one—whether the nature of the defect merits this peremptory procedure. Because the Commission has chosen to use the TIB, which proceeds by investigation and complaint procedures, perhaps the range of substantive issues that may be addressed through rejection is somewhat broader than that established by the "patent nullity" standard discussed in text. This standard should be considered as applicable to classical, threshold rejection; the degree of obviousness required for modified procedures is reserved for future decision.

[24] Action may be initiated within 60 days after the tariff takes effect, and there is no time limit on completion of the proceedings. *Southern Motor Carriers, supra*, 676 F.2d at 1376, 1378 n. 12.

[25] A complaint, answer and response are allowed, but there is no discovery, compulsory process, or administration of oaths.

issue of whether effective tariffs may be rejected using *formal* complaint procedures. 676 F.2d at 1379 n.14. The Commission contends that its present decision envisions formal complaint procedures before the Commission prior to rejection of any tariff. Therefore, we must decide whether the Commission may ever reject or suspend effective tariffs. We hold that it may not.

It is necessary to understand the precise role of rejection and suspension within the range of enforcement powers under the Act. Carriers within the jurisdiction of the Act ("common carriers") are required in order to offer service to file tariffs containing their rates, and must charge and collect the amounts contained in the filed tariffs, no more and no less. 49 U.S.C. §§ 10761, 10762. If a filed and effective tariff is found by the Commission after investigation and a hearing to be unlawful, the Commission may order compliance with the Act in several fashions, including prescribing the proper rates and awarding damages for violation of the Act. *See* 49 U.S.C. § 10704(b)(1) (prescription); § 11701 ("appropriate action"); § 11705(b)(3) (damages). Because these corrective powers do not prevent unlawful rates from their inception the Commission also has the power to suspend a rate for a limited time before it becomes effective in order to investigate it for lawfulness. *U.S. v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 513, 96 S.Ct. 2318, 2325, 49 L.Ed.2d 14 (1976) (the "purpose [of suspension] [i]s to give the Commission 'full opportunity for ... investigation *before* the tariff becomes effective'") (emphasis in original).[26] Similarly, the Commission may reject

[26] The suspension provision, 49 U.S.C. § 10708, requires by its own terms that this action be taken before the rate becomes effective. Quoting without ellipses, this provision states:

> The Commission may begin a proceeding to determine the lawfulness of a proposed rate immediately when a new rate is filed. The Commission may take whatever final action as [sic] it could in a proceeding begun after a rate became effective. Pending final action in [such] a proceeding, the Commission may suspend the proposed rate at any time for not more than 7 months beyond the time it would otherwise go into effect. If the Commission does not take final action during the suspension period, the proposed rate is effective at the end of that period.

a tariff submitted where these are obvious defects such that investigation and a hearing are unnecessary. 49 U.S.C. § 10762(e). As we explained in *Southern Motor Carriers, supra*, 676 F.2d at 377-78, the plain meaning of rejection is to refuse to receive. It has been held that "rejection is a regulatory device properly used only *prior* to a tariff's effective date, ... [and] an investigation is the only mechanism available for challenging *effective* tariffs." *Delta Air Lines Inc. v. CAB*, 543 F.2d 247, 268 (D.C. Cir. 1976) (emphasis in original). *See also Alaska Pipeline Co. v. U.S.*, 436 U.S. 631, 640, 98 S.Ct. 2053, 2059, 56 L.Ed.2d 591 (1978) (stating that once a rate becomes effective, "the only relief against unreasonable rates [lies] in the reparations [damages] remedy").

As further explained in *Southern Motor Carriers*, there are compelling reasons to restrict rejection to the period before a rate becomes effective. Because a carrier may charge only the rates on file, and because rejection has the effect of declaring a rate void *ab initio* as if never filed, rejection necessarily carries with it a right to refund for overcharges (in the case of rate increases), measured always by the preexisting rate.[27] This undermines the uniformity and reliability interests that the system of tariff filing was meant to foster. In the words of the Supreme Court:

> To adopt such a rule and arbitrarily measure damages by [overcharges] would create a legalized but endless chain of departures from the tariff; ... would destroy the equality and certainty of rates; and contrary to the statute, would make the carrier liable for damages beyond those inflicted....

Davis v. *Portland Seed Co.*, 264 U.S. 403, 421, 44 S.Ct. 380, 383, 68 L.Ed. 762 (1924) (holding that illegality does not render rate nonexistent or subject carrier to liability for overcharges).

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[27] Even if this were not logically necessary the Commission's regulations appear to require it *See Southern Motor Carriers, supra*, 676 F.2d at 1377 & n.7. *See also Shoebe, Inc.* v. *Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975) ("The penalty for rejection is exclusive: the voiding of the tariff.") (ellipses omitted).

Review of the statute, the major decisions, and policy, then, leads us to conclude that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking. The only decisions to shed doubt on this conclusion are two lines of cases noted in our *Southern Motor Carriers* case, *supra*, 676 F.2d at 1379-80. Neither is controlling.

In *Acme Fast Freight, Inc.*, 17 M.C.C. 549, 556-57 (1939), *sustained*, 30 F.Supp. 968 (S.D.N.Y.), *aff'd*, 309 U.S. 638, 60 S.Ct. 810, 84 L.Ed. 993 (1940), the Commission found that rules filed with it that had become effective were illegal and ordered them rejected and stricken from its files. This is a limited precedent, however. The reason for illegality was that the filing party was not a common carrier within the jurisdiction of the Act and thus the rates "[w]ere not required by the statute to be filed, [the Commission was] not bound to accept them, and ... [they had] no proper place in [its] files." 17 M.C.C. at 555. This is an unexceptional result that allows the Commission to toss out irrelevant and unnecessary material because the filing party is not within its jurisdiction. This action does not have the same unsettling effect as rejection of a tariff filed by a common carrier; where the filing party is not within the Commission's jurisdiction it is not prevented from charging whatever rates it pleases for its noncommon carrier services and is not liable for overcharges. This case, then, does not establish the general rule that rejection may be used at any time against illegal tariffs.

The second precedent is *Chicago, M. St. P. & P.R. v. Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957), which holds that an illegality in an effective tariff subjects the carrier to liability for overcharges. By implication, this supports rejection of effective tariffs, for as discussed above overcharge liability is a necessary corollary to rejection. We hold on the basis of persuasive and controlling authority, however, that *Alouette Peat* was wrongly decided.

We begin with an explanation of the distinction between overcharges and damages or reparations. Overcharges are awarded "for amounts charged that exceed the applicable

rate ... contained in a tariff filed under [the Act]." 49 U.S.C. § 11705(b)(1). Damages or reparations are awarded for violations of the Act, and are not necessarily measured against any existing or former tariff. *Id.* at § 11705(b)(2), (3).[28] To illustrate, if the Commission were to find after a full hearing that the maximum allowable rate increase is 12%, and then a carrier were to unlawfully increase its rates 14%, a shipper who pays the 14% increase may not recover "overcharges" measured against the old rate, for the 14% increase, although illegal, took effect and was the applicable rate. However, the shipper may recover *damages* of 2% for the carrier's violation of the Commission's order, measured by the difference between the lawful 12% rate increase and the rate in fact charged. This was the result in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1750, 72 L.Ed.2d 161 (1982).

Alouette Peat Products was a case on all fours with *Genstar*. The carrier increased rates more than the 6% allowed by the Commission. Instead of awarding damages of only the difference between the rate charged and the rate allowed, however, the court awarded overcharges measured from the old rate that previously had been in effect. This decision seems to us internally inconsistent,[29] contrary

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[28] The Supreme Court has explained:

> [A] clear distinction [is made] between overcharges and damages ... under the [Interstate] Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages, but as overcharges.... [But if the shipper paid the tariff rate and,] as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay, and the carrier to retain, what had been paid, leaving ... to the [shipper] the right to apply to the Commission for reparation.

Davis v. *Portland Seed Co.*, *supra*, 264 U.S. at 420, 418, 44 S.Ct. at 382.

[29] At one point the court stated that "the increased rates were the *applicable* rates to be applied to the shipments in question." Later the court stated that "[n]o change having been legally made in the rate which existed before [the increase], [the old] rate was the only existing, legally established rate and the Court was bound to apply it." 253 F.2d at 455, 456 (original emphasis).

[Footnote Continued]

to the statute and consistent Commission decisions,[30] and in conflict with Supreme Court precedent.[31] It has caused confusion even within the agency for a quarter century.[32] We therefore decline to follow *Alouette Peat*, as the D.C. Circuit declined to follow it in *Genstar*, *supra*, 665 F.2d at 1309.[33]

In conclusion, providing more formal procedures does not cure the essential defect in rejecting or suspending effective tariffs, namely, that the statute and caselaw limits these powers to use against only proposed tariffs. To the extent that the Commission's decision conflicts with this holding it is reversed.

The Commission's decision is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

The court stated that "shipper was entitled to recover the difference between what he had paid and what the Commission found to be the *reasonable rate*" (*i.e.*, the approved increase). In its next breath, the court stated that the shippers were "entitled to recover the difference between what they had paid and the *lawfully established rate*" (*i.e.*, the old rate). *Id.* at 455 (emphasis added).

[30] *See* discussion *supra* regarding the statute, and cases collected in *Southern Motor Carriers*, *supra*, 676 F.2d at 1379, and in *Genstar*, *supra*, 665 F.2d at 1308, concerning Commission precedents.

[31] *Portland Seed Co.*, supra, 264 U.S. 403, 44 S.Ct. 380. *See note 28 supra*.

[32] *Compare Shoebe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975) (*Alouette Peat* "did not hold that the tariff was void"), *with Phillips Petroleum Co. v. Akron, Canton & Youngstown RR. Co.*, 308 I.C.C. 257, 259 (1959) (in *Alouette Peat*, "rates ... were declared to be illegal and void").

[33] In disapproving *Alouette Peat*, we note two matters that we do not face and therefore do not decide. First, we do not decide whether the proper measure of damages for a statutory violation can ever be the difference between the rate charged and the previous rate. *See Genstar*, *supra*, 665 F.2d at 1309 n. 3. Also, because the statute of limitations for damages recovery is shorter than for overcharges recovery, the Commission has chosen to expand the concept of overcharges for purposes of awarding a damage remedy where necessary to obtain the longer limitations period. *See H.J. Baker & Bros. Inc.*, 357 I.C.C. 640 (1978) (on facts identical to *Genstar*, calling the action one for overcharges, but awarding only 2%, not 14%). We do not pass on the validity of this reasoning.

APPENDIX B

Served December 30, 1980

INTERSTATE COMMERCE COMMISSION

EX PARTE NO 297 (SUB-NO 5)

MOTOR CARRIER RATE BUREAUS—IMPLEMENTATION OF P.L. 96-296

Decided December 19, 1980

Rate bureau provisions of the Motor Carrier Act of 1980 explained and implemented.

DECISION

BY THE COMMISSION

I. INTRODUCTION

This proceeding was instituted on August 1, 1980,[1] pursuant to section 14 of the Motor Carrier Act of 1980, Public Law 96-296. That provision establishes new requirements and standards for motor carrier rate bureaus as a condition precedent to their continued antitrust immunity. The act further provides that motor carrier rate bureaus may continue to function under their previously granted immunity provided they: (1) submit new or amended agreements to the Commission for approval within 120 days of the enactment of the statute; and (2) observe the requirements and standards of the act as well as any implementing regulations during the time amended agreements are being prepared, submitted, and considered by the Commission.

In our instituting notice, we adopted rules and interpretations to facilitate interim compliance with section 14 of the act.[2] We also invited public comment on whether our interim rules and interpretations should be adopted as the final standards. This decision represents our conclusions based upon our analysis of the statute, its legislative history, and public comments.

To preserve their antitrust immunity, motor carrier rate bureaus will be required to file new or amended agreements in conformity with our final standards. Revisions will be required only when existing agreement provisions are inconsistent with the final rules. To clarify our rules, we

[1] 45 F.R. 55734 (August 21, 1980).

[2] This decision was stayed on October 6, 1980, by the United States Court of Appeals for the Fifth Circuit in No. 80-7674, *American Trucking Associations, Inc., et al. v. United States of America and Interstate Commerce Commission.*

are offering sample amendments for bureau consideration.[3] The precise wording of our samples need not be adopted. However, in any case where bureau amendments fail to conform to our final standards, we will disapprove the proposed amendments and consider terminating the agreement.

Sixteen rate bureaus, the American Trucking Associations, Inc., and the National Classification Committee (the Rate Bureaus) object to the institution of this proceeding for substantive matters other than quorum requirements. They believe that Congress carefully and narrowly tailored each of the requirements and prohibitions of section 14 as a limitation on the Commission's discretion. They argue that the substantive provisions were designed to be self-executing. They support this position by referring to Congress' specific direction that we establish by regulation reasonable quorum standards. The omission of similar language in other provisions of section 14 allegedly demonstrates that Congress did not envision a broad-based rulemaking to establish general rate bureau standards. According to these respondents, Congress contemplated a simple two-stage process. A first-stage submission of new or amended agreements by each bureau was to be followed by the consideration and disposition of each new or amended agreement by the Commission on a case-by-case basis.

Although certain provisions of section 14 are self-executing, the diversity of opinion expressed in the comments demonstrates that further clarification and interpretation is necessary. Under general principles of administrative law, notice and comment rulemaking is preferable to case-by-case adjudication when an agency is determining the standards that will govern the future conduct of an industry. *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *NLRB* v. *Majestic Weaving Co.*, 335 F. 2d 854 (1966); *Pressly* v. *FCC*, 437 F. 2d 716 (1970).

In our notice, we referred to a second stage of this proceeding in which we would review the amended agreements on the basis of the revised national transportation policy (NTP) for motor carriers, 49 U.S.C. 10101(a)(7). We are not requiring rate bureaus to file briefs on the issue with their amended agreements. Instead, we will presume that a new agreement which is entirely consistent with the terms of this decision is not inconsistent with the NTP. We will, however, review the terms of each agreement filed for consistency.

Section 10706(b)(2) now requires Commission approval of collective ratemaking agreements "upon a finding that the agreement

[3] To the extent necessary, we are also ordering changes in bylaws. Bylaws must be consistent with our interpretations. Since not all of the new procedures are applicable to each bureau, amendments will be required only in those areas applicable to a bureau's activities.

fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the [NTP]." It is apparent that a substantial change in the burden of proof associated with the approval of rate bureau agreements has been mandated by Congress.

In addition to the change in the burden of proof, Congress also established the Motor Carrier Ratemaking Study Commission. The Study Commission was directed to prepare and submit to the President and Congress before January 1, 1983, a comprehensive report assessing the merits of the collective ratemaking process and whether there is a need for continued antitrust immunity. A second-stage proceeding to evaluate each of the amended agreements on the basis of the revised NTP could interfere with the role of the Study Commission. Accordingly, when an amended agreement is in compliance with this decision, we will grant it antitrust immunity unless a substantial doubt has been raised that the agreement is consistent with the public interest.

We requested comments on whether our clarification of the various statutory provisions should be codified in the Code of Federal Regulations (CFR). We observed that, while regulations seem to be required for quorum standards, other statutory provisions are self-executing.

Having reviewed the comments, we have decided against codification. Our decision in the original *Rate Bureau Investigation*, 349 I.C.C. 811 (1975) and 351 I.C.C. 437 (1976),[4] has operated satisfactorily without codification. Copies of this decision will be available upon request and through publication in the Interstate Commerce Commission Reports. In addition, the sample amendments or their substance will appear in the approved rate bureau agreements which the bureaus will make available to the public upon request. Rules at 49 CFR 1331 applicable to motor rate bureaus which are inconsistent with or superceded by this decision will be repealed. To the extent rules governing bureau conduct remain relevant (sections 1331.5 and 1331.6) they will be incorporated as standards in this decision.

Within 20 days from the service date of this decision, the motor carrier rate bureaus shall file new or amended agreements in conformity with the act as we have interpreted it in this final decision. This filing shall supercede any filing that may have been submitted for the purpose of satisfying the October 29th statutory deadline. Interested persons shall then have 45 days to comment upon the proposed agreements' compliance with our interpretation of 49 U.S.C. 10706(b). This time period is adequate to allow interested parties to study the proposed agreement at the Commission or at the bureau. The comments should refrain from addressing general issues of public interest unless a prima facie showing

[4] Affirmed *Motor Carriers Tariff Ass'n, Inc. v. United States*, 559 F. 2d 1251 (4th Cir. 1977).

can be made that the agreement is inconsistent with the NTP. A copy of any comments filed shall be served on the respective bureaus and they will have 20 days to reply. Specific proceedings will be instituted only in the event of a prima facie showing or an inconsistency between this decision and the amended agreements.

II. NEW STANDARDS RELATED TO BUREAU OPERATIONS

A. *Identification and description of the member carriers.*—49 U.S.C. 10706(b)(3)(A) provides that:

> Each carrier which is a party to an agreement must file with the Commission a verified statement that specifies its name, mailing address, and telephone number of its main office; the names of each of its affiliates; the names, addresses, and affiliates of each of its officers and directors; the names, addresses and affiliates of each person, together with an affiliate, owning or controlling any debt, equity, or security interest in it having a value of at least $1,000,000. In this subparagraph, "affiliate" means a person controlling, controlled by or under common control or ownership with another person and "ownership" means equity holdings in a business entity of at least 5 percent.

The sparse response to the requirements of identification and description suggests that those requirements are, in fact, self-explanatory. In response to certain questions asked in the comments, we note that: (1) the requirement applies only to business and not nonprofit organizations; and (2) the term "person" is defined in the 49 U.S.C. 10102(15).

B. *Right of Independent Action.*—49 U.S.C. 10706(b)(B)(ii) provides:

> [T]he organization may not interfere with each carrier's right to independent action and may not change or cancel any rate established by independent action after the date of enactment of this subsection, other than a general increase or broad rate restructuring, except that changes in such rates may be effected, with the consent of the carrier or carriers that initiated the independent action, for the purpose of tariff simplification, removal of discrimination, or elimination of obsolete items.

Collective ratemaking by motor common carriers was immunized from the antitrust laws by the Reed-Bulwinkle Act in 1948. The carriers engage in these collective activities through rate bureau organizations which function pursuant to Commission-approved agreements. To mitigate the anticompetitive effects of collective ratemaking, Congress required rate bureaus to give their members the absolute right of independent action. Because the right of independent action is central to the grant of antitrust immunity, the Commission has always prohibited any interference with the free exercise of this right.

In Notification of Rate Proposals, 358 I.C.C. 487 (1978), we defined independent action as:

any action taken by a common carrier member of a rate bureau,* * *.

(i) To establish a rate to be published in the appropriate rate bureau tariff, or to cancel a rate for that carrier's account, or

(ii) to instruct the rate bureau that an existing rate (whether established by independent action or collective action), that is proposed to be changed or canceled, be retained for that carrier's account and published in the appropriate bureau tariff, or

(iii) to have published for its account in the appropriate rate bureau tariff a rate established by the independent action of another carrier. This definition applies regardless of the manner in which the carrier joins in the rate, as long as the rate published for the joining carrier's account is the same as the rate established by the other carrier under independent action 49 CFR 1331.6(A)(1).

We adopt this definition here as well as the 49 CFR 1331.6 requirements for changing rates published under independent action. Independent actions may be taken by one carrier, on a single-line rate, or by interlining carrier on a particular joint-line rate. As defined, independent action is not limited to the establishment of a separate rate for the account of one carrier. It also includes changes to any published rate made only for the independent actor's account, as well as the refusal to agree to particular changes sought by other carriers.

Recognizing that ratemaking freedom is crucial to price competition, our notice proposed to ban the docketing, publication, circulation, or discussion of independent actions in advance of Commission filing. We reasoned that rate bureaus exist primarily as a forum for collective action on matters related to more than one carrier. Independent action is not related to these activities or to the functioning of the bureau on matters of collective interest. Subject to the exceptions in the statute, the bureau's role with respect to independent action should be limited to the administrative function of tariff publication, as directed by the independent actor.

The majority of commentors oppose this proposal. Both shippers and carriers challenge our authority to make this requirement and the practical need for it. A number of shipper interests believe the simultaneous docketing proposal is self-defeating. They argue that independent actions should be exposed to public scrutiny before they become effective. The 30-day statutory notice period allegedly is not adequate. Without advance docketing, they maintain that a massive shipper monitoring effort would be necessary. They also argue that the benefits of independent action under simultaneous docketing are illusory and even harmful to shippers. For rate increases, they argue that without rate bureau docketing, shippers will inadvertently use carriers which proposed rate increases that became effective through independent action. For rate reductions, they argue that the actual benefits of an independent action would be short lived or nonexistent. Westinghouse contends that by examining each

new tariff publication carriers can "quickly inform the rate bureau to publish the same provision as the one established independently by another." National Small Shipments Traffic Conference and Drug and Toilet Preparation Traffic Conference (NASSTRAC/D&TPTC) allege that even if a carrier can obtain a temporary jump on its competitors, the advantage would be brief and minimal since few shippers would be aware of the independent action in time to tender freight. They also question the carriers' ability to advise shippers in advance of independent action rate reductions. The Bureau of Competition of the Federal Trade Commission disagrees with this analysis, contending that rates established under simultaneous docketing would enjoy sufficient lead time to make the action profitable to its initiator. Those shippers supporting our proposal urge that we require greater notice to shippers through bureau docket bulletins.

Our concern that collective ratemaking not interfere with independent action is a key part of this decision. As will be discussed, *infra*, we have taken many actions over the years to protect the right of independent action. However, following review of the comments, we do not believe it necessary, at this time, to ban advance notice of independent actions. Instead, we will require all agreements submitted for our approval to meet the following requirements which are consistent with our authority both prior and subsequent to the Motor Carrier Act of 1980:

(1) Proponents of independent actions have the absolute right to decide whether or when rate bureaus will docket these actions[5];

(2) The bureau must comply with the instructions of the proponent of an independent action with regard to whether or not the action should be docketed, and in the absence of explicit instructions shall refrain from docketing until the proposal has been filed with the Commission.

(3) There may be no rate bureau discussion of independent actions until they have become effective.

Carrier members of a rate bureau may publish an independent action in their own tariffs, or they may publish them in a bureau's tariffs, using the bureau as the tariff publishing agent. Independent actions published in a carrier's own tariffs are subject only to the notice requirements in 49 U.S.C. 10761-10766. Under those requirements, an independent actor need not notify other carriers or shippers of its proposal.

When a carrier chooses to publish its independent action in a bureau tariff, a particular procedure is usually followed. The carrier directs the bureau to publish an independent action, and the bureau will generally

[5] Subject to three exceptions, discussed *infra*, related to general increases and broad rate restructurings and the restrictions applying to independent actions which change or cancel independent actions of other carriers.

"docket" the action. "docketing" consists of entering the proposal in bureau's files and then giving notice of the proposal to other carrier members of the bureau and shipper subscribers to this publication. Under this commonly used procedure, the bureau does not immediately file the independent proposal with the Commission. Instead, the bureau gives the members of the bureau time, generally 10 to 15 days, to indicate whether they want to join in the independent action and have it published for their accounts, and may also accept shipper protests which are then forwarded to the proponent of the action. After this waiting period ends, the bureau files the independent action with the Commission for the account of the proponent (unless instructions to withdraw it are given) and for any joining carriers.

Our proposal gives proponents of independent actions the absolute right to specify the publishing details when the bureau acts as publishing agent. Thus, an independent actor may request that no "docketing" occur (i.e., that no notice of the proposal be given to anyone), that docketing and filing with the Commission occur simultaneously (i.e., that notice of the proposal be given to other carriers and shippers concurrently with Commission filing), or that docketing occur some specified length of time prior to filing (*e.g.*, giving notice to other carriers and shippers 15 days prior to Commission filing). This gives the independent actor the same degree of control over a bureau-published independent action as the proponent has over publication in its own tariff. Essentially, we confer on an independent actor the same rights it had under the statute prior and subsequent to the Motor Carrier Act of 1980.

Prior to the 1980 amendments, rate bureaus had to grant each party to the agreement "the absolute right" to take independent action. The Commission has always interpreted that absolute right to mean that a carrier member of a rate bureau had to be completely free to choose between publishing its independent actions in its own tariffs, or having them published by the rate bureau. Thus, a bureau could not require a carrier to publish independent actions in the proponent's own tariff, *Rocky Mountain Motor Tariff Bureau, Inc.—Agreement*, 293 I.C.C. 585, 594-96 (1954), nor could the bureau require that independent actions only be published in the bureau's tariffs, *Central States Motor Common Carriers—Agreement*, 289 I.C.C 517, 524-25 (1953). Instead, the carrier had to be free to assign publication to an agent or to make its own publication, and in the latter case, the bureau could not require the carrier to conform to bureau procedures. *Rocky Mountain, supra*. Given these basic principles, we held, in *Southern Motor Carriers—Agreement*, 297 I.C.C. 603, 610 (1956), that any procedures or rules established by the bureau which might limit or restrain the right of a carrier to act independently in

the publication of rates is objectionable, unless a stipulation is made that such procedures are advisory in nature only and not mandatory or binding upon the rights and privileges of any member.

These cases and others establish the principle that the right of independent action requires independent actors to have exactly the same publication options under a bureau agreement as they have with respect to proposals published totally apart from the bureau. It follows, therefore, that under the old law a bureau would have had to obey an independent actor's instruction to publish the independent proposal without any notice to anyone, advance or otherwise.

This principle is unaffected by the fact that most, if not all, bureau agreements incorporate provisions for the advance notice docketing procedure which are generally phrased in mandatory terms, and which give the impression of being firm requirements. The principle is also unaffected by the fact that the Commission long ago formally recognized the advance notice practice, and approved its use. See *Notice of Independent Action*, 332 I.C.C. 22, 23 (1967). As shown by the cases cited above, the advance notice procedure, even though commonly used, cannot be mandatory in a case of independent action. In fact, some current bureau agreements *(e.g.,* Rocky Mountain Motor Tariff Bureau) contain the exact language the Commission used in *Southern Motor Carriers, supra,* to emphasize that bureau procedures do not bind independent actors.

Some parties who submitted comments in the instant rulemaking, however, most notably the Rate Bureaus and NASSTRAC/D&TPTC argue that 49 CFR 1331.5 requires advance notice of all independent actions taken through a rate bureau.

This interpretation is incorrect. 49 CFR 1331.5 does not preclude a carrier from ordering a bureau to publish an independent action without notice.

49 CFR 1331.5 states:

> When independent action is announced and tariff publication is to be made by a publishing agent operating pursuant to an agreement under section 5a of the Interstate Commerce Act, notification thereof will be given by the agent to the same extent and in the same manner that the agent gives notice of actions proposed under procedures for collective consideration of the parties to the agreement, and no other joint or collective procedures under the agreement are thereby invoked.

This rule was adopted in Ex Parte No. 253, *Notice of Independent Action*, 332 I.C.C. 22 (1967). When we instituted Ex Parte No. 253 we knew that carriers often used bureaus to publish independent actions, and that the bureaus made a practice of giving advance notice of the proposals. 332 I.C.C at 23. We were also aware that independent actions with advance notice could take on the characteristics of collective actions

because advance notice allowed other carriers to join an independent action prior to its filing with the Commission. Prior to issuance of this rule, we had required the bureaus to notify shippers and the general public of ordinary collective actions, but had never required bureaus to notify *shippers* of independent actions that could in effect be converted to collective action through advance notice. Ex Parte No. 253 determined that the bureaus should be required, when a carrier proposes an independent action in which other carriers could join, to provide the same notice to shippers that they gave to carriers in the case of independent actions and to shippers and carriers in cases of collective actions. This conclusion (332 I.C.C. at 30) reflected the fact that the two kinds of actions were alike. Ex Parte No. 253 did no more than make the notice requirements for advance noticed independent actions equal to those for collective actions. Thus, Ex Parte No. 253 does not require the bureau to give advance notice of all independent actions. Rather, it simply requires the bureau also to notify shippers when advance notice of an independent actions is given to carriers. Ex Parte No. 253 did not take away each carriers's well-established right to direct the bureau to publish an independent action without any advance notice.

The Motor Carrier Act of 1980 does not change this longstanding policy permitting carriers to specify exactly how they wish a bureau to handle their independent action requests. As relevant here, section 10706(b)(2) provides that a collective ratemaking agreement:

> Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy.

Two of the requirements referred to in this provision concern independent actions and are contained in new 10706(b)(3)(B)(ii) and (iii). In the words of the new act's legislative history these requirements place "strict limitations upon rate bureau treatment of independent actions" * * *" H. Rept. 96-1069, 96th Cong., 2d sess. 30 (1980).

The key is the prohibition against bureau interference with a carrier's right of independent action. There is no indication in the statute or its history that this language makes the right of independent action any less absolute than it was under the old law. Rather, the new act, if anything, makes the right even more absolute by statutorily prescribing the scope of bureau power to change or cancel independently set rates, and by prohibiting bureau protests or complaints against any independent act-

ion. Neither the new act nor its legislative history indicated that Congress intended to overturn the Commission's existing policy in this area.

From this analysis, it follows that the right to take independent action in bureau tariffs includes not only the right of each carrier to determine whether its action will be docketed but also the right to direct the bureau as to when it should be docketed, if it pursues this route. That is, each carrier may specify any period of advance docketing[6] or docketing simultaneous with Commission filing. Bureau agreements may not, in any way, restrict this exercise of choice. To ensure that these decisions are made by independent actions, *each agreement must require that, in submitting independent actions, the proponent must indicate in writing exactly whether the item is to be docketed or not and, if it is to be docketed, when docketing is to occur.* If specific instructions are not given, the bureau may not process the proposal until they are received.

As we are authorizing bureaus to docket independent actions in advance it is necessary to affirm a restriction on this process. There may be no bureau discussion of independent actions until they become effective.

This does not necessarily prohibit other carriers from having an independent action proposal published for their own actions. In effect, the carrier proposing an independent action will choose whether this is possible when it gives the bureau docketing instructions. If it wishes to gain a competitive advantage it may request docketing simultaneous with or after filing of a tariff schedule at the Commission. If a carrier chooses this course of action, we will not destroy its competitive advantage by granting other carriers special permission to file on less than statutory notice. Competitors may, without discussion of any sort, act independently to notify the bureau that they wish similar rate adjustments for their own accounts (again, subject to docketing instructions given to the bureau by each). If a competitor desires adjustment to its own account, it may request docketing under normal collective ratemaking procedures (subject to statutory restrictions on permissable discussion).

If, on the other hand, the independent actor requests the bureau to docket before a tariff supplement is filed, it is possible for a competitor to have the independent action published for its own account with the same effective date. The decision to join must be made, however, without discussion or collective agreement of any sort. If the competitor wants discussion, it may docket a similar proposal for collective action, but we will not permit the collectively discussed adjustment to become effective on less than statutory notice. To the extent necessary, we will amend outstanding special permission orders consistent with this approach.

[6] I.e., advance notice to shippers and carriers.

In effect, the independent actor will control the process. It will have the ability to gain a competitive advantage if it so desires. We will not make simultaneous docketing mandatory, since there may be legitimate reasons why this would not be appropriate in certain situations. However, we intend to monitor independent action docketing practices closely and take any necessary action if we detect a consistent pattern of noncompetitive behavior.

Ex Parte No. 253, *supra*, recognized that independent actions could in effect, be converted to collective ones. We stressed at 332 I.C.C. 31-32 that "the similarity of procedure to be adopted between independent and conference [collective] action is to extend merely to the giving of public notice and not to any other procedures involved in collective consideration." This language indicates that an agreement permitting such discussion of independent actions would be unlawful. In fact, the Rate Bureaus state that they do not now permit discussion of independent actions after docketing. The Bureaus define docketing as:

> A term of art used in the transportation industry to refer to the ministerial procedure of entering in writing a proposed action, collective or individual, in the files of the bureau and providing notice of it to all interested persons upon its receipt by the bureau and prior to filing with the Commission* * *. Docketing entails only notice of a carrier's instruction to the bureau in the exercise of its right of independent action. It does not serve to institute collective procedures of any sort.

On their reply statement they also state:

> Some parties, notably the FTC and OSC, support the ICC's proposed bar on bureau discussion of IA's. Other parties, including DOT, question the ICC's proposal. None of these parties takes cognizance of the fact that the *bureau provides no means for discussion or collective consideration of IA's*. And the Commission expressly barred any such discussion in Ex Parte No. 253, *Notice of Independent Action, supra*. Hence, these parties are raising an issue that simply does not exist* * *. [Emphasis in original.]

Accordingly, our conclusion to ban any discussion of independent actions docketed by a bureau upon request of a proponent merely continues the current bureau practice.

We believe this conclusion is also consistent with the new act. As discussed above, Congress was especially concerned with guaranteeing the integrity of independent actions, distinct from collective ones, and we assume it was aware of our findings on this subject. While new section 10706(b)(3)(B)(i) might be read to allow discussion of independent actions following docketing we believe this section must be read as applying only to proposals docketed for *collective* action. Any other interpretation would constitute a dramatic change and there is no indication that Con-

gress intended one. In fact, the legislative history of this section refers to section 4 as limiting the permissible scope of collective ratemaking.

We previously permitted the practice of docketing independent action in advance of filing to continue as long as it was not an "imperative requirement." See *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683, 689 (1957) and *Southern Agreement, supra* at 616. However, circumstances have changed greatly under the new act. Competition has been assigned a primary role in rate regulation. While carriers always had the right not to docket independent actions, it was rarely, if ever, exercised. With the new emphasis on competition in rates and entry, it is an appropriate complement to the new act to encourage the carriers to take all actions, including the choice of whether or when to docket independent rate changes, to improve their competitive position.

To the extent that carriers continue to choose advance docketing of independent actions the practical concerns raised here by shippers are moot. Furthermore, a carrier's choice to docket simultaneously with tariff filing or not to docket at all need not result in the dire consequences shippers predict.

There has been and continues to be a great expansion in competitive alternatives. Shippers need not accept whatever rate or service is provided. They are now able to find more responsive transportation alternatives in most situations. Liberalized and expedited entry and restrictions removal policies make it relatively easy for a shipper to obtain quickly more responsive common or contract carrier service. Indeed, a carrier will have a clear incentive not only to apprise shippers of its own rates and services, but to alert shippers to the advantages its offerings enjoy over those of its carrier competitors.

Accordingly, we are not persuaded by arguments that without advance notice carriers can indulge in and benefit from surreptitious behavior. As the providers of a service in a competitive environment, carriers will be forced to become more responsive to their customers' needs and more aggressive in their pursuit of business and expansion. To be secretive or to act contrary to the best interest of shippers, will result in lost business. Carriers may advertise new rates and services in a variety of ways, and need not necessarily rely on the bureau docket bulletins as the most effective way to provide shippers with advance notice.

Advance docketing is not essential to the best interest of shippers, carriers, and the general public. With respect to the shippers and the public, competition will provide the most effective, albeit not the only, safeguard. Carriers may advertise new rates and services in many ways, including through their marketing and sales departments so that shippers may be informed of changes in advance. We disagree with the shippers'

implication that they have a right when dealing with this industry, as opposed to any other to receive more advance notice of competitors' rates. In addition to the statutory notice period, traditional Commission remedies remain available in the case of unlawfulness.

In response to our earlier proposal, the Rate Bureaus assert that the carriers will be harmed because simultaneous docketing precludes them from concurrently exercising their right to compete. We cannot accept this argument. A carrier exercising its choice as to how or whether to provide notice to competing carriers should encourage real competition through the potential reward to the independent actor. Competing carriers may not use the rate bureau procedures to negate the effect of innovative rate proposals.

Rockwell International questions whether shippers may continue their practice of submitting proposals to the rate bureau without carrier sponsorship. In the *Rate Bureau Investigation*, we instituted the 120-day final disposition rule to insure reasonably expeditious processing of shipper proposals. Congress adopted this longstanding policy, and we reaffirm a shipper's right to submit rate proposals directly to the bureau.

With three exceptions, section 10706(b)(3)(B)(ii) of the act provides that rate bureaus "may not change or cancel any rate established by independent action." The three exceptions apply to tariff simplification, removal of discrimination, and elimination of obsolete items. This means that no carrier may propose a change in another carrier's independently set rate under the quise of its own independent action or as a collective proposal. We agree with the Rate Bureaus that this limitation should not be construed as a notice and consent requirement on a carrier seeking to change or cancel its previous independent action through a subsequent independent action. We make the following interpretations with regard to the three exceptions:

(1) Tariff simplification does not contemplate changes to independent rates for purposes of rate equalization. Rate equalization is not equivalent to tariff simplification.

(2) An item is obsolete only when a carrier has gone out of business or has verified that status in writing. Copies of such consent statements shall be made available to any interested party upon reasonable request and at a reasonable charge.

(3) Removal of discrimination, as noted by DOT, does not encompass the equalization of rates charged by different carriers.

The written consent of the carrier which initiated the independent rate must be obtained and kept on file before a rate change may be made under these three circumstances. Written consent must be voluntary without any kind of direct or indirect pressure or coercion and may not be waived under any circumstances.

General increases and decreases and broad rate restructurings are not subject to the same notice and consent requirements. However, these adjustments may not have the effect of canceling or eliminating any rate differential or difference in the application of rates established previously by independent action without prior written authorization of the initiator and any participants. General increases, reductions, or restructurings may only adjust independently established rates by the same amount or percentage as they change rates established through collective procedures for similar movements.

Sample amendment:

There is reserved to each carrier participating in a tariff published by this organization the free and unrestrained right to take independent action either before or after any determination is made under any procedure of this organization. Each carrier, in submitting an independent action proposal to the bureau for filing in its tariffs, has the right to prohibit docketing by the bureau and the right, if it chooses to have the item docketed, to establish the itme of that docketing. New rates or other new tariff items proposed under independent action and docketed will not be discussed before or after ICC filing.

This organization will change or cancel a rate established by independent action only for the purposes of tariff simplification, removal of discrimination, or elimination of obsolete items.

With the exception of a member carrier changing or canceling its own independent action for its own account, the organization will use the following procedures to change or cancel an independently established rate, whether the change or cancellation is proposed under collective procedures or under the right of independent action:

1. Each carrier whose independently established rate would be affected, shipper, and other interested parties will be provided 14 days' notice (not counting the date the notice is sent) of any meeting at which a proposal to change or cancel a rate established by independent action will be considered. Notice will include: the rate, if there is one, limitations of weight or other restrictions pertaining to the existing rate and the proposed rate, the commodities moving under the rate, the relevant origin and destination points, each carrier whose independently established rate is proposed to be changed or canceled and the identity of the proponent of the change or cancellation.

2. Member carriers, shippers, and other interested parties shall have at least 14 days, after notice is sent to express their views to the appropriate committee of this organization. Their views may be expressed in writing, in person, or by any other means consistent with the established procedures of this organization.

3. A change or cancellation in independently established rates will only apply to those affected carrier members if those members have sent, and this organization has received, written consent to the change or cancellation. The written consent will clearly identify the rate and the change, and will be signed by a representative of the consenting carrier member. The rate will continue to be treated as an independently established rate for the account of any affected carrier which does not give written consent to the change or cancellation. This requirement may not be satisfied by written proxy.

General rate increases and broad rate restructurings are excepted from these requirements. However, these collective adjustments will not

cancel rate differentials or differences in the application of rules existing as a result of any independent action taken previously, unless the initiator and any other participants in that independent action desiring to eliminate such rate differentials or applications first notify this organization in writing.

C. *Rate Bureau protests.*—49 U.S.C. 10706(b)(3)(B)(iii) provides:

[T]he organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier of property.

The act imposes a total prohibition against bureau protests and complaints. Contrary to the assertion of NASSTRAC/D&TPTC, we have no discretion in this matter. The Rate Bureaus correctly contend that since the statute is clear, adoption of any implementing rule is unnecessary.

D. *Employee docketing.*—49 U.S.C. 10706(b)(3)(B)(iv) provides:

[T]he organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers.

Having interpreted the term "docket" to include "propose," our notice prohibited organization employees from proposing changes in tariff items published by or for the account of member carriers. We interpreted the phrase "act upon" to refer to the consideration of proposed changes and any determination or recommendation concerning their merits, publication, or effectiveness. Thus, we proposed a broad prohibition which would include screening performed by committees, if bureau employees participated in committee consideration or determination.

We did not prohibit employees from providing legal advice to carriers. Nor did we prohibit them from developing general cost data to support general increases or acting as moderators at meetings, provided they did not participate in the substance of the discussions.

Historically, the Commission has been concerned that the judgment of rate bureau employees not be substituted for the judgment of the member carriers, particularly with regard to the level of rates and charges. In 1956, we stated that "[s]uch practices are contrary to the spirit, if not the letter, of section 5a and of the Commission's approval of section 5a agreements." *Southern Agreement, supra* at 617.

The legislative history of the new act indicates that Congress shares our continuing concern. Senate Report No. 96-641, 96th Cong., 2d sess. 14 (1980) expressed the Committee's strong belief "that rate bureau employees should play less of a part in determining carrier rates than the carriers themselves." S. Rept., *supra* at 14. The House Report also notes

that "* * *many have contended that the entire process is controlled largely by rate bureau employees rather than by the carriers themselves." H. Rept., *supra* at 27.

On the other hand, Congress expressed respect for the expertise of rate bureau employees. The Senate Report noted that a strict prohibition against employee recommendations regarding changes in tariff items was removed from the Senate bill and replaced with the current provision. The report observed "* * * it is clear that these individuals have a good deal of expertise and that their recommendations are valuable to the member carriers." S. Rept., *supra* at 14. The House Report concurred, noting that "Many of these rates bureaus are staffed by skilled rate experts with technical expertise to process rate applications and to make recommendations and proposals to the members of the bureaus for changes in basic rate structure." H. Rept., *supra* at 27.

All of the parties agree that employees should not initiate or submit rate proposals nor make final determinations to adopt, reject, or otherwise dispose of proposals. The parties also stress the importance of employee expertise in developing effective competitive rate proposals. However, several parties state that the Commission has exceeded its statutory authority by limiting the activities of bureau employees to developing general increase cost data, presiding over meetings, and giving legal advice. The Motor Carriers Traffic Association, Inc., asserts that smaller carriers will be unable to engage in informed competitive pricing without the technical help and analysis of the bureau. The Oil Field Haulers Association, Inc., emphasizes that the role of bureau employees is to use their expertise in consultation with the carrier, so that dockets reflect the precise intentions of the proponent and comply with the Commission's tariff publishing rules.

The Rate Bureaus oppose our interpretation, alleging that it is inconsistent with the legislative history and incompatible with section 10706(b)(3)(D)(iv), which allows rate bureaus to provide "support services" for member carriers. The Rate Bureaus observe that our interpretation results in certain inconsistencies. For example, they question how shipper comments relating to general increases and decreases may be considered if the employees are prohibited from participating in the substance of carrier discussion.

The National Industrial Traffic League (NITL) agrees that employees should neither originate nor make a final determination or set policy about a rate proposal. NITL supports our interpretation but requests that it be clarified to permit the analysis of docketed proposals by rate bureau employees. The analysis would be upon the request of a member and could not result in a recommendation.

Respondents' arguments are persuasive and we will adopt and ratify the following rate bureau statement:

> Thus, the term "docket," as used here, refers to the act of proposing rates and the terms "act upon any proposal" refer to the act of determining whether to adopt, or otherwise dispose of a proposal. The statute does no more and no less than bar *these* employee activities and, in doing so, it accomplished the Congressional purpose of assuring that carriers will propose their own rates and make their own decisions. [Rate Bureau comments at 27.]

Accordingly, we will permit bureau employees to offer the full benefit of their expertise to the member carriers. Upon request, they may perform the analysis and offer the advice that will enable the proponent of a rate change to docket the proposal in proper form. However, employee advice shall be available only as a resource to the carrier(s) which actually initiates the tariff proposals. We emphasize that any employee advice concerning independent action proposals shall remain confidential. Bureau expertise must not be used to compromise independent competitive pricing strategies. As an adjunct to our findings regarding the docketing of independent actions, no employee may divulge the existence of any instruction of a carrier member not to docket an independent action, or the absence of any explicit instruction on handling or docketing of an independent action, to any other carrier.

Our final interpretation of this section is compatible with a majority of the comments. However, compliance with this section will require substantial reorganization by the National Classification Committee (NCC). This issue is being addressed further in Ex Parte No. MC-98 (Sub-No. 1), *Investigation of Motor Carrier Classification System.* The NCC, in their joint comment with 10 regional rate bureaus observed specifically that:

> the restriction [in this section] was aimed at the prior practice of some bureaus, much criticized during the hearings on the MC Act, of allowing employee committees to propose rates and make dispositions of docketed proposals that became final absent appeal to a carrier committee. [Rate Bureau comment at 27.]

We agree that Congress intended to prevent this practice. However, it is our understanding that the NCC functions in this proscribed manner. The National Classification Board, an employee committee, makes a "recommended" disposition on all docketed classification proposals. Their recommendation becomes final, absent reconsideration by the board or appeal to the elected members of the NCC. The NCC, and all other bureaus relying on employee boards to initiate and/or to dispose substantively of tariff change proposals, shall submit amended agreements which comply with the new act.

Sample amendment.

Employees and employee committees of this organization will neither initiate a proposal nor determine whether to adopt, reject, or otherwise dispose of a proposal effecting a change in any tariff item published by or for the account of any member carrier.

Employees and employee committees may provide expert analysis and technical assistance to a member carrier in developing or evaluating a carrier initiated rate or rule proposal. Any advice concerning an independent action proposal shall remain confidential.

E. *Open meetings.*—49 U.S.C. 10706(b)(3)(B)(v) provides:

Upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization.

The legislative history demonstrates strong congressional concern for closed rate bureau proceedings. Most objectionable is the practice of secret voting on specific rate proposals. The monitoring of rate bureau meetings is considered necessary to protect the public interest and foster the competitive goals of the act. The statutory sunshine requirement allows for adequate monitoring and provides a reasonable safeguard against potentially illegal activity.

Implicit in the unconditional right to be admitted to bureau meetings is the responsibility of the rate bureaus to afford reasonable notice of scheduled meetings. To protect that right, discussion or voting on rates will not be permitted unless the meeting is reasonably noticed. Reasonable notice of all meetings to discuss and/or vote on rates or rules shall be given by the organization in its docket bulletin. In addition to stating the time and place of the meeting, the notice must identify the rates or rules which will be on the agenda. If the subject concerns a rate, a list or general description of the commodities moving under the rate, the appropriate origin and destination points, the justification for the proposed action, and any other useful or relevant data shall be included in the notice.

We interpret the phrase "any person" to include representatives of motor carriers, nonbureau competitors, carriers by other modes, shippers, public interest groups, and government agencies. We agree with the Rubber Manufacturers that admission to meetings cannot be contingent upon compliance with any conditions or procedures. Thus, the unconditional right to attend meetings precludes any requirement of advance notice to the bureau. It also includes the right to take notes or use recording devices provided the conduct of the meeting is not disrupted.

Although the statute does not specifically permit any limitation on the number of attendees at meetings, it must be recognized that considerations of room capacity and safety may dictate reasonable limitations. Any

unreasonable or arbitrary attempt to limit attendance at meetings is unacceptable.

The phrase "upon request" shall encompass all requests, however presented. The Rate Bureaus object to the requirement that requests for identification of a proponent and for votes cast should be answered immediately. Clearly, this information is readily available and its rapid retrieval should not burden the organization. A prompt response is necessary since dilatory actions tend to negate the usefulness of the information. Because of the availability of modern methods for tabulating and computerizing votes, the bureau's contention that 2 or 3 days are needed to respond is generally unacceptable unless a holiday or weekend intervenes. Requirements for written requests and the charging of a requestor for this information is unacceptable. Under the act, this information function is a basic responsibility of the bureaus. Further, the form of a request need not be limited to asking how a carrier voted on a specification. For example, bureaus must respond to requests for the indentity of those carriers which to approve or disapprove a particular item. The requestor cannot be expected to know the names of every voting carrier in order to get information to which he is entitled.

The basic thrust of open meetings is to protect the public's interest in rates established through collective procedures. The congressional mandate for sunshine is acknowledged by the Rate Bureaus. While based on convenience, the rate bureaus' reliance upon mail voting and telephonic communications could be interpreted as contrary to the sunshine requirement. Nevertheless, we will refrain from prohibiting their use. Instead, the bureaus are cautioned not to use these procedures to circumvent the restrictions on voting or discussion. If there is abuse, we will reopen this issue to consider corrective measures.

This section does not require admittance to or divulgence of information from meetings devoted to internal personnel rules and procedures of the organization.

Sample amendment:

Upon the request of any person, the name of the proponent of a rule or rate docketed with this organization, and the vote cast by any member on any proposal before this organization, shall be promptly divulged.

Any person requesting admittance to a meeting at which rates or rules are being discussed shall be admitted immediately. Note taking and sound recordings by attendees are permissible, provided the conduct of the meeting is not disrupted.

Notice shall be given of meetings at which rates or rules may be discussed and/or voted on. It will state the time and place of the meeting, the rate proposals or rules to be discussed or voted on, a list or general description of the commodities moving under the rate, the relevant origin and destination points, the justification for the proposed action, and any other relevant information.

Notice of meetings will be transmitted at the same time to each receiver (subscriber), member and nonmember, of the organization's docket bulletin.

F. *Proxy voting.*—49 U.S.C. 10706(b)(3)(B)(vi) provides:

The organization may not allow a carrier to vote for one or more other carriers without specific written authority from the carrier being represented.

In our notice, we proposed a signed and dated proxy with a brief statement of the type or duration of the authorization. The proxy could remain effective for 2 years, and there was no limit on the number of proxies a carrier could hold. The bureau would be responsible for maintaining copies and insuring compliance.

The Special Counsel comments favorably, and the Rate Bureaus reiterate their opposition to a specific rule or interpretation. However, our section on general standards, *infra*, and the relationship between general standards and proxy voting require modification of this proposal.

Section 10706(b)(3)(B)(i) provides that after January 1, 1981, only carriers with authority to participate may vote upon specific rate proposals. Under the general standards section, we have decided to require a simple written certification of authority on each voting ballot. Consistent with this approach, a proxy holder would be required to complete the ballot's certification of authority for the absent carrier. As the Rate Bureaus observe, it would be difficult, if not impossible, to determine whether the absent carrier possesses appropriate authority for as many as several hundred votes per meeting. Therefore, we will require the proxy to specify the docket item(s) to be voted on and to contain a certification that the giver of the proxy possesses authority to participate in each specified item. In effect, the practicalities of adopting the Rate Bureau approach mean that a proxy can only extend to particular tariff proposals.

We will also require clear instructions to the proxy holder regarding how votes should be cast. Consistent with the congressional mandate, this will eliminate the proxy holder's voting discretion when it does not possess authority. This requirement also recognizes that the proxy holder and giver may be competitors, and their interests may not coincide. Each carrier should make its own decisions based on the demand for and the cost of its services. Proxies may not be accepted for the purpose of certifying permission to cancel any item established by independent action which the carrier represented by proxy either initiated or joined. Notice of approval to cancel such items must take the form of a letter so that it may be kept on file, and so that copies can be distributed on request and at reasonable charge.

To assure compliance with these requirements, the bureau shall provide standard proxy forms. A copy of each proxy exercised shall be made

part of the voting record. A proxy may be revoked at any time, either by subsequent written verification or by the member carrier appearing at a meeting and voting on its own behalf. There is no limit to the number of proxies a carrier may hold.

Sample amendment:

Any carrier voting for another must possess a written proxy. The proxy must be dated and contain the signature of the carrier releasing the vote, the specific item or items for which the vote is released, the directions on how each vote is to be cast, and written certification that the carrier possesses authority for each specified docket item.

The bureau will provide standard proxy forms to members, and a copy of all proxies exercised will be made part of the voting record. There is no limit to the number of proxies a carrier may hold. A proxy may be revoked at any time by a subsequent written revocation or by the carrier appearing at the meeting and voting on its own behalf.

G. *Quorum standard.*—49 U.S.C. 10706(b)(3)(F) provides:

The Commission shall, by regulation, determine reasonable quorum standards to be applied for meetings of organizations established or continued under an agreement approved under this subsection.

In our notice, we decided that the use of a percentage figure was appropriate because it treats all bureaus equally, regardless of their size. For the discussion of rates and rules, we proposed 35 percent of the organization's membership as the quorum for the organization meeting and 35 percent of a committee's membership as the quorum for the committee meeting. Our decision was directed at preventing the domination of meetings by a small number of carriers.

The Rubber Manufacturers, the Special Counsel, and the National Association of Specialized Carriers, Inc. (NASC) support the 35-percent quorum. Western Motor Tariff Bureau, Inc., expresses satisfaction with a 35-percent quorum, provided it does not apply to organizational or other bureau meetings where tariff rates or rules are not discussed. Motor Carriers Tariff Association, Inc., a bureau consisting of smaller carriers, states that the 35-percent quorum, even when supplemented by proxy voting would substantially impair its operations. Since small carriers lack the personnel to attend frequent meetings, it asserts that even a 25-percent representation has been difficult to achieve.

The Rate Bureaus support a 30-percent quorum. They oppose the application of the quorum standard to general membership meetings, contending that it would be unworkable and would stifle the bureaus' ability to conduct rate-related business. They also object to defining a quorum as a fixed percentage of the entire membership. The Rate

Bureaus point out that this definition would be impractical because in most cases 35 percent of total bureau membership would greatly exceed the membership of even the largest bureau rate committees. Moreover, they note that the proposed definition would be inconsistent with traditional concepts of parliamentary procedure which relate the quorum exclusively to the size of the particular group or subgroup that is involved.

Establishment of the quorum at 30 percent of membership of the organization *or* 50 percent of the committee holding the meeting is reasonable from our perspective and appears generally acceptable to the participants. This was our intent in the notice. The quorum requirement shall apply to any bureau meeting when discussion includes the following subjects: general rate increases and decreases, tariff restructurings, specific rate adjustments, or rules and classifications proposed for tariff publication. Carrier members present by means of a proxy shall count towards the satisfaction of the quorum requirement. We will consider individual bureau requests for lower quorum requirements, but an exception will be granted only where genuine hardship is demonstrated.

Sample amendment:

At any meeting of the organization or committee of the organization, at which rates, rules, or classifications are discussed or considered, 30 percent of the membership of the organization or 50 percent of the committee shall constitute a quorum.

H. *Final Disposition of cases.*—49 U.S.C. 10706(b)(3)(B)(vii) provides:

[T]he organization shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed, except that if unusual circumstances require, the organization may extend such period, subject to review by the Commission.

Congress essentially adopted Commission policy in this area. The statute provides that extensions beyond 120 days would be "subject to review by the Commission." In our notice, we construed this clause as an actual requirement that the bureaus petition for an extension of the 120-day time limit. We provided that petitions must be received at least 30 days prior to the expiration of the time limit or the pending proposal would automatically terminate.

The Rate Bureaus, the Rubber Manufacturers, and the Special Counsel oppose the prior approval provision. They assert that the congressional intent was simply to codify Commission policy and that the statutory language cannot support more than an after-the-fact review. The Rate Bureaus point out that it is not always possible to know by the 90th day whether an extension will be necessary. The Rubber Manufacturers assert that automatic termination would adversely affect the ship-

ping community, the original proponent and principal beneficiary of the rule. It would permit the carriers to disapprove a rate proposal without action and therefore without the individual accountability that is contemplated by the sunshine provisions of the new act. With one exception, all parties support the continuation of the current policy with Commission oversight to prevent abuse. Rockwell International advocates an automatic approval policy whenever the 120-day time limit has expired. Rockwell International asserts that this is the most effective method to deal with inaction on shipper proposals.

We are persuaded that the statutory language contemplates an after-the-fact review along the lines established in our *Rate Bureau Investigation*. However, in adopting the Rate Bureau approach, we also adopt the construction of the 120-day period that was contained in our notice. If the 120th day falls on a Saturday, Sunday, or public holiday, the final day for disposition will be the first working day thereafter.

As our policy has been in effect for a few years, we assume that the bureaus have already amended their bylaws to reflect this requirement. However, as necessary they should amend their bylaws to include the above construction of the 120-day provision.

III. Standards for Member Carrier Voting and Discussion of Collectively Established Rates

A. *General standards.*—49 U.S.C. 10706(b)(3)(B)(i) provides:

> [S]ubject to the provisions of subparagraphs (C) and (D) of this paragraph, (I) the organization may allow any member carrier to discuss any rate proposal docketed, but (II) after January 1, 1981, only those carriers with authority to participate in the transportation to which the rate proposal applies may vote upon such rate proposal.

The intent to infuse additional competition into the ratemaking process cannot be more evident than in the provisions which define the limits for discussion and voting on collectively established rates. In contrast to rates established by independent action, collectively established rates, whether single or joint line, may be docketed, discussed, and voted upon by any member carrier until January 1, 1981. After that date, docketing and discussion may continue in the traditional manner, but voting is limited to those carriers with authority to operate under the proposed rates.

To guarantee that voting is limited to carriers with the appropriate authority, we proposed that each bureau submit a plan for identifying eligi-

[1] Subparagraphs (C) and (D) refer to released rates, zone of rate freedom adjustments, and single-line rates. They are discussed elsewhere in this decision.

ble carriers. The bureau would be required to make a sworn certification that each vote taken is limited to carriers with the requisite authority.

The Rate Bureaus contend that anything beyond their enforcement of an individual carrier certification is a practical impossibility. Specifically, they refer to the number of carriers that may be voting in any one instance and both the length and complexity of the certificates. The problem is compounded by the difficulty in ascertaining joint-line authorities, the effect of commercial zones and restriction removals, and the accuracy of the bureau's records. Additionally, they object to an individual sworn certification contending that it would constitute an extreme and highly disruptive burden in view of the number of ballots cast during a meeting. In the alternative, they propose including a written affirmation on the voting ballot. They assert that this will be equally effective since a carrier voting without authority will be in violation of the agreement and subject to penalties regardless of a sworn certification.

The Special Counsel suggests that a sworn certification raises more questions than it answers. It questions who will take the oath and execute the document and seeks clarification as to whether the oath must be taken with first-hand knowledge of each operating authority. The Special Counsel proposes that we emphasize that the bureau and its members will lose their antitrust immunity, at least for the particular vote, as a result of the participation by an ineligible carrier. With this understanding, the bureaus would be permitted to develop their own plans.

Realistically, there may be instances in the future when a quorum may be convened but only one or two carriers will have the requisite authority to vote on a specific rate proposal. In these circumstances, the bureau may be able to comply with the proposed certification requirement. Nevertheless, we are persuaded that our proposal is impractical for the average bureau vote and unnecessarily severe since voting by an ineligible carrier would expose the bureau and its membership to antitrust prosecution on that particular vote. Accordingly, we shall adopt the bureau proposal and require that a written affirmation be made part of the voting ballot for each individual vote. However, if the bureau has actual knowledge of carrier violations, it must take appropriate action to enforce this provision. Failure to do so may lead to its being considered a party to the violation.

The Automobile Transporters Tariff Bureau, Inc., questions whether a member carrier may vote on a collective action rate proposal if it has authority to participate in the transportation to which the rate applies but is not a party to the tariff because of a prior independent action. Our primary concerns are that there be no restraint upon the right of independent action and that authority to participate is honored as the threshold

requirement in voting. Beyond this, the membership of the individual bureaus may determine whether to require participation in the tariff item as an additional requirement in voting upon collective action rates.

Rockwell International questions the status of a rate proposal when a quorum has convened but none of the carriers present, in person or by valid proxy, possess authority to participate in the transportation service to which the rate proposal applies. Section 10706(b)(3)(B)(i) establishes actual authority as the prerequisite for voting. Accordingly, there can be no voting unless at least one carrier present, in person or by proxy, possesses the authority for a lawful vote.

Sample amendment:

While any member carrier may discuss (unless otherwise proscribed) any collectively established rate proposals docketed, after January 1, 1981, only those carriers with authority to participate in the transportation to which the proposed rates apply may vote on the rates.

A written affirmation will be made by each carrier for itself and for the proxies it holds concerning individual eligibility to vote on collectively established rates after January 1, 1981.

B. *Single-line rates.*—49 U.S.C. 10706(b)(3)(D) provides:

No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under section 14(b)(4) of the Motor Carrier Act of 1980 on or before January 1, 1983 . . .

In our notice, we stated that compliance with this section required the prohibition of advance docketing of single-line movements in rate bureau proposals. A single-line rate is defined in section 10706(b)(1) as a "rate, charge, or allowance proposed by a single motor common carrier of property that is applicable only over its line and for which the transportation can be provided by that carrier."

The Rate Bureaus oppose our proposal, contending that the section may never take effect or its effective date may be delayed pending the report of the Motor Carrier Ratemaking Study Commission. They assert that it is premature to adopt any interpretations. We cannot agree. The public and the industry will benefit from a clear and comprehensive statement interpreting this section. Moreover, section 10706(b)(4) provides that we may issue regulations to implement the restrictions of section 10706(b)(3)(D) to take effect on or after the date antitrust immunity is terminated.

The Mobile Transportation Rate Bureau, Inc., the Gulf Ports Association, Inc., and the Rate Bureaus maintain that our proposal is unreasonable and contrary to the intent of Congress. They argue that a prohibition

of advance docketing will not serve the public interest. We believe our amended standards for independent actions and reasoning for them apply equally here. Carriers must be given the choice whether to give advance notice to their competitors of single-line rates changes, and if it is given through the docket, the timing of the notice. Congress decided to eliminate antitrust immunity for discussion and voting on single-line rates. As the Special Counsel observed, advance docket notice to competitors of single-line rate changes should not be allowed to circumvent the ban on collective action. Contrary to the assertions of the parties, specific permission to carriers to choose not to or how to docket is necessary precisely to accomplish congressional intent. In the practical sense, the choice not to docket would produce an independent action. Therefore, with respect to single-line rates, all rate bureau agreements shall be modified to permit carriers to prohibit, after January 1, 1984 (or July 1, 1984), docketing in advance of filing or to direct the timing of the docketing. Discussion and voting are prohibited after this date. The agreements shall also prohibit inclusion of single-line and joint-line rates in one proposal.

The Department of Defense inquires whether the definition of single-line rates includes household goods tariffs and section 10721 (government) tenders, when these rates are published on a mileage basis, without regard to origin or destination ("general application rates"). The problem stems from the applicability of one set of rates to both single- and joint-line movements. Nevertheless, it is clear that rates which apply to any single-line movement of household goods fall within the statutory definition of single-line rates. In the past, household goods carriers sought exemption from the requirements of the *Rate Bureau Investigation, supra*, asserting that their service is "unique" and unlike that of general-commodity carriers. The exemption was denied upon a finding that there is no substantive difference in the respective collective ratemaking processes. There is nothing in the act or legislative history to suggest that an exemption was contemplated for household goods tariffs. Rather, the legislative history reveals Congress' recognition that this section would require extensive procedural changes. Both the House and the Senate Reports observed:

> Under current practices, most tariff rates are identical for both single-line and joint-line movements. Thus when [the carriers] discuss individual rates, they generally do not distinguish between single-line and joint-line rates. This has not always been the case, however, and need not be in the future.

. . . . . .

The Committee is aware of the fact that this will result in a significant change in the way that motor carriers price their services. It will mean that consideration of single-line and joint-line rates must be done separately. It will put a greater burden upon individual carriers to determine their own cost structures and or the most optimum rates from their individual company point of view to offer the shipping public. But on balance, the Committee believes that there will be public benefits that greatly outweigh the burdens of changing to a new system—namely more competitive pricing. H. Rept., *supra* at 27-28; S. Rep., *supra* at 13.

Accordingly, household goods carriers will be required to revise their agreement to the same extent as all other motor common carriers of property.

Section 10721 provides antitrust immunity for government traffic in the following terms:

A carrier may quote or tender a rate established under an agreement made and approved under section 10706 of this title, but the exemption from the antitrust laws provided by that section applies only when the filing requirements of this paragraph are met.

Section 10706 is the source of antitrust immunity for the collective determination of tenders for government traffic, provided carriers comply with the filing requirements of section 10721. Since section 10706 provides the scope of the immunity, the elimination of antitrust immunity on single-line rates in section 10706(b)(3)(D), effective January 1, 1984 (or July 1, 1984), must also apply to government traffic. Therefore, after antitrust immunity is lifted, carriers shall not collectively set single-line rates for tender or quotation on government traffic.

Sample amendment:

After January 1, 1984 (or July 1, 1984), all single-line rate proposals will be treated as independent actions. After this date, there shall be no discussion or voting on single-line rates by the bureau members or committees. Single-line rates shall not be included in the same item as joint-line rates, except as authorized by 49 U.S.C. 10706(b)(3)(B).

IV. Specific Exceptions to These Standards

A. *General increases and decreases.*—49 U.S.C. 10706(b)(3)(D)(i) provides an exception to the limitation on single- and joint-line ratemaking for general increases and decreases. This exception is subject to the following restrictions:

(1) The agreement must provide procedures to give shippers at least 15 days' notice of a proposal;

(2) Shippers must be given the opportunity to present comments on the proposal before it is filed with the Commission;

(3) Discussion of these proposals must be limited to industry average carrier costs; and

(4) After January 1, 1984 (or July 1, 1984), there may be no discussion of individual markets or particular single-line rates, even if discussion is limited to industry average costs.

We interpreted "notice" to mean advance notification to shipper subscribers through the bureau's docket bulletin. Since the act gave us discretion to require a longer notice period, we proposed that notice be issued at least 4 weeks before filing and that at least 2 weeks be provided for filing and serious consideration of written comments. For the purposes of this decision, we adopt the definition of a general increase contained in 49 CFR 1331.6(a)(5):

A "general increase," when the term is used in reference to a motor common carrier rate increase, is a proposed general adjustment of substantially all the rates published in a rate bureau's tariff or tariffs.

The Rate Bureaus object to the implementation of this section before 1984. They assert that the exception for voting and discussion on general increases and decreases applies only to the single-line voting and discussion restriction which takes effect in 1984. We disagree. There is nothing in the act or legislative history to indicate that the effectiveness of this section was to be delayed until 1984. Rather, the delayed implementation of only the portion of the section relating to individual markets and particular single-line rates, convinces us that none of the other provisions should be delayed. Until January (or July) 1, 1984, rate bureaus may permit, but not require, single-line rates to be filed under collective procedures. This will permit a carrier, if it chooses, to submit single-line rates for discussion and voting. After the elimination of this possibility in 1984, docketing of all single-line rates will be tantamount to docketing of independent actions and no filing under collective procedures will be permissible. In addition, apart from the exceptions stated in section 10706(b)(3)(D), no proposal which includes both single-line and joint rates may be discussed or voted on as of the 1984 cutoff date.

The Rubber Manufacturers and the NITL support our proposal with the former reciting the advantages of greater dialogue and the resolution of disputes before Commission filing. The bureaus generally contend that a 4-week notice period before Commission filing is too long. A bureau could give notice, allow 2 weeks for comments, meet for discussion and voting, and still be required to wait another 2 weeks before the 4-week period expires. The Special Counsel suggests that the 15-day notice period provided in the section is sufficient.

The Western Motor Tariff Bureau, Inc., and NASC point out that a notice period "before the filing date of the proposal" may not be the

most effective way to provide adequate notice. The legislative intent was to facilitate shipper comment on pending rate proposals. Practicality dictates that shipper comments should arrive before the bureau meets to discuss and vote. Therefore, the critical time element is the time of the meeting rather than the time of filing. These respondents suggest that the notice period should be expressed in terms of the time before the meeting.

We agree that the proposed 4-week notice period before filing may produce unnecessary delay. Consistent with bureau suggestions, we will reframe the notice period in terms of time before discussion or voting. We will adopt a 15-day notice period prior to discussion and/or voting. Consistent with our treatment of the 120-day time limit for disposition of rate bureau dockets, the 15-day period will not include Saturdays, Sundays, or legal holidays. This formulation can also apply to mail voting. However, if mail voting is utilized, the bureaus must arrange to inform the carriers of shipper comments early enough to permit serious consideration. Shipper comments shall be accepted until the time of the meeting.

The American Paper Institute, Inc. (API), questioned whether the term "industry average carrier cost information" includes regional average costs. API states that national cost data lacks probative value in a discussion of a regional bureau's tariff change. We accept API's interpretation. In our opinion, the discussion of regional industry average costs is permitted by the statute.

In this regard, the Rate Bureaus argue that Congress did not intend to limit all discussion to industry average costs when a general increase or decrease is being considered. The Rate Bureaus interpret this section as restricting cost discussions to regional industry average costs. Other pertinent issues, including the need for an increase, its effect on shippers, and its lawfulness, remain appropriate grounds for discussion. However, the act plainly states and the legislative history corroborates that "discussion of such increase is limited to industry average carrier costs." Some of the topics of discussion suggested by the Rate Bureaus, such as the need for an increase or its lawfulness, would be inextricably involved in a full discussion of costs. However, we cannot interpret the unambiguous words of Congress to condone discussion beyond "industry average carrier costs." In any case, we do not see this as a problem. To the extent any carrier believes that a general rate increase will adversely affect its own competitive posture or that of its shippers, it may take independent action.

***Sample amendment.*— General rate increases and decreases may be discussed and voted on only if:**

(1) Shippers receive notice, through docket bulletin publication, at least 15 (excluding Saturdays, Sundays and legal holidays) days prior to the time a proposal is to be discussed and/or voted upon;

(2) Shippers are accorded the opportunity to present either oral or written comments for consideration at the meeting;

(3) Shippers' comments are given appropriate weight and consideration in discussion and voting upon the proposals;

(4) Discussion is limited to regional industry average carrier cost information, and after January 1, 1984 (or July 1, 1984), discussion may not include individual markets or particular single-line rates.

B. *Changes in tariff structures.*—49 U.S.C. 10706(b)(3)(D)(iii) extends the same exception granted for discussion and voting on general increases or decreases to changes in tariff structures (broad rate restructurings). The exception applies if discussion is limited to industry average carrier costs, and does not include discussion of individual markets or particular single-line rates after the elimination of antitrust immunity for single-line rates.

DOT urges us to interpret the phrase "broad rate restructuring" and to state how we will insure that restructuring will not be used to interfere with independent action rates. This record does not permit us to formulate a definition. We defer to Ex Parte No. MC-82, *New Procedures in Motor Carrier Revenue Proceedings* where a comprehensive record on this issue has been assembled.

For interim guidance we note a colloquy which generally discusses changes in tariff structure. This statement presents the view that a change in tariff structure is broad in scope and nature; may affect both single- and joint-line rates over a large geographical area; may involve multiple commodities, rates, rate scales, origins and destinations; and may include both increases and reductions in rates. See 126 Cong. Rec. H5411 (daily ed. June 19, 1980) (remarks of Rep. Boner).

Contrary to API's observations, our interpretation of this section was not intended to complicate matters. We intended to make clear that calling something a broad tariff change could not be used to evade other statutory restrictions, such as the protections for independent action or the ban on collective setting of single-line rates effect in 1984.

The proper forum for discussion of rate relationships and other restricted topics is between the affected shipper and its carrier. The carrier may then propose necessary changes either for its own account or for collective action.

Sample amendment:

Discussion of changes in tariff structure (broad tariff restructurings) is limited to regional industry average carrier cost information. After January 1, 1984 (or July 1, 1984), discussions of individual markets or particular single-line rates are also prohibited.

C. *Zone of freedom and released rates.*—49 U.S.C. 10706(b)(3)(C) provides:

> No agreement approved under this subsection may provide for discussion of or voting on rates to which the provisions of section 10708(d) or 10730(b) of this title apply, except that rates established or filed under section 10730 of this title before the date of enactment of the Motor Carrier Act of 1980 or changes with respect to such rates may be discussed or voted on under agreements approved under this subsection until January 1, 1984.

Section 10708(d) establishes a zone of rate freedom for motor carriers of property and freight forwarders. Essentially, carriers are allowed increases up to 10 percent above rates in effect the year before and reductions down to 10 percent below rates in effect on July 1, 1980, without Commission intervention on the reasonableness issue. Subsection (d)(4) continues our authority to suspend and investigate any rate proposal within the zone on the basis of discriminatory or predatory pricing.

This section prohibits discussion of and voting on adjustments within the zone and released rates. The legislative history states that no collective action on these items is permitted, and that the rates may be proposed only by individual carriers (H. Rept., *supra* at 29), i.e., through independent actions.

Section 10708(d)(4) provides antitrust immunity for the "docketing and publication" of rates in the zone. The legislative history indicates that the purpose of this immunity is to permit the rate bureaus to perform administrative functions relating to rates which cannot be collectively considered or established. To emphasize that there is to be no collective consideration of these rates the drafters stated:

> The Committee does not intend by the use of the language "docketing and publication of such rates" to preclude the Commission from issuing rules and regulations to assure that carriers who utilize the zone of rate freedom do so individually and not collectively. (H. Rept., *supra* at 75.)

As with ordinary independent action proposals, if a proposed rate change is docketed in advance of filing, all competing carriers are notified and the advantage the independent actor might otherwise have had is nullified, especially in the short run. To protect the purpose of zone pricing and its independent nature it is necessary to affirm the right of proponent carriers to ban the docketing of zone rates or to have the sole discretion to choose when and for how long they will be docketed. Again, in the absence of explicit instructions for handling and docketing from the proponent of an independent action, the bureau may not docket the item until the proposal has been filled with the Commission.

We believe that our proposal is consistent with the immunity granted by the act for docketing and publication of zone rate proposals. The act denies us authority to disallow bureau docketing or publication of zone rates. However, the legislative history establishes that we may issue rules and regulations to assure that docketing and publication of zone rates do not become a subterfuge for collective consideration. Moreover, since advance docketing offers opportunity for informal carrier discussion, failure to take action risks negating the act's specific prohibition against discussion of or voting on zone rates. Moreover, our amended approach does no more than give each carrier member of the bureau the right it already had to direct bureau processing of its independent actions.

Section 10730(b) pertains to released rates. It permits the establishment of rates for the transportation of property (other than household goods) which limit the carriers' liability to a value established by written declaration of the shipper or by written agreement between the carrier and shipper. This section specifically prohibits any discussion of or voting on released rates if the rates have not yet been established when the act goes into effect. The legislative history states that all collective ratemaking on new released rates is prohibited. In view of our decision on zone rates, we believe that the same standards for docketing of new released rate proposals are warranted. Contrary to Rate Bureau assertions, the legislative history does not require advance docketing to assure that shippers are informed at all stages of the process. The legislative history does require that the carriers, in their tariffs or by any other means, fully and clearly inform shippers "about the kinds of rates and liability rules they agree to." Competition, along with recourse to traditional Commission remedies, will provide a safeguard against unreasonable and discriminatory released rates. Carriers acting individually may and should inform shippers in advance of released rate filings by consulting with them. If the "fully informed" requirement of the legislative history were to be interpreted as advocated by the Rate Bureaus, Congress would not have banned rate bureau discussion.

Section 10706(b)(3)(C) also provides that until January 1, 1984, the ban against discussion or voting shall not apply to rates already in effect. After January 1, 1984, released rates regardless of the date they were established may not be the subject of collective action. The legislative history is silent as to what constitutes a new as opposed to an already effective released rate for the purposes of permissible collective action. This presents interpretation problems since existing released rates established collectively may be expanded or substantially revised. We will interpret the limitation on collective action such that the expansion of a preexisting released rate or the inclusion of related new commodities

under preexisting released rates, for whatever reason, will result in the establishment of a new released rate for the purpose of activating the statutory ban against collective action. To avoid further proceedings before the Commission individual carriers may choose to establish new released rates rather than attempting to amend released rate orders.

As noted, no discussion or voting on zone of rate freedom adjustments or new released rates is permitted by the statute. If a carrier wishes, it may permit docketing of these adjustments prior to filing with the Commission. However, unlike independent actions, other carriers do not have the option of docketing the same proposal under normal collective ratemaking procedures. They may, however, notify the bureau (individually and without discussion) that they want similar rate adjustments for their own publication. We will not permit use of special permission authority to circumvent another carrier's competitive initiative in this situation. Until January 1, 1984, our treatment of "old" released rates will be identical to that afforded independent actions.

Sample amendment:

Each carrier has the right to determine whether or how the bureau will docket rate adjustments under 49 U.S.C. 10708(d) and 10730(b). No discussion or voting on rates proposed under the zone of rate freedom is permitted. Released rates, as defined by section 10730(b), may only be discussed or voted on, until January 1, 1984, if collectively established or filed with the Interstate Commerce Commission prior to July 1, 1980.

D. *Changes in commodity classification.*—49 U.S.C. 10706(b)(3)(D)(ii) provides an exception to the limitations on single- and joint-line ratemaking for changes in commodity classification. We noted that under this exception all carriers would continue to discuss and vote on changes, whether or not they hold authority to transport the commodities for which classification changes are proposed. The breath of activity covered under this exemption is being determined in Ex Parte No. MC-98 (Sub-No. 1), *supra*.

The NCC, the New England Motor Rate Bureau, the Bulk Carriers Conference, and any other bureaus which develop and maintain freight classifications may continue functions permitted under the exception without need for an amendment to implement this provision. However, all bureau operations, including classification change procedures, must comply with the other new standards including those relating to open meeting, employee docketing, proxy, and quorum. The new standards will generally require conforming amendments from all bureaus.

The House Committee expressed concern that abuse of this section might result in collectively set single-line rates after 1984. The Committee stated that it "intends that changes in commodity classification solely

for the purpose of affecting single-line rates to individual shippers or individual markets would not be immune from the antitrust laws." H. Rept., *supra* at 28. Allegations that the commodity classification is being used to set single-line rates may be made through the strike mechanism of the Tariff Integrity Board (TIB), *infra*, or through investigation, suspension, or complaint procedures. These congressional concerns prompted us to expedite our deliberations in Ex Parte No. MC-98 (Sub-No. 1), *supra*.

E. *Permissable bureau functions.*—49 U.S.C. 10706(b)(3)(D)(iv) provides that the prohibition against the discussion of or voting on single-line rates and the requirement that voting be limited to carriers with authority to participate in the transportation to which the rate proposal applies do not apply to:

> [P]ublishing of tariffs, filing of independent actions for individual member carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

Activities are not included in the prohibition on rate discussion. Bureaus may continue to perform these services for carrier members without the requirement of a new amendment.

V. Burden of Proof of Violations and Effect of Violations

49 U.S.C. 10706(b)(3)(E) provides:

> In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

This section places the burden of proof upon the alleging party to show that the violation occurred. The reference to "parallel behavior" (behavior of one or more parties that is similar or identical, absent proof of intent to agree) means that it is not sufficient to show that a carrier ultimately published the same rate. A showing of parallel behavior without more would not establish an unlawful price-fixing agreement. This is a difficult level of proof.

To assure bureau compliance with the act, we will rely, in part, on shipper monitoring. The open meeting requirement will obviously encourage compliance. However, because it is unrealistic to expect most shippers to attend meetings, we believe some recordkeeping requirement is also necessary. As an interim standard, we required bureaus to make sound recordings of all meetings.

With the exception of DOT and the Bureau of Competition of the Federal Trade Commission, the parties oppose a sound recording requirement. The bureaus and various shipper interests contend that the sunshine provision of open meetings is an adequate deterrent to illegal activity. They argue that sound recordings inhibit the free exchange of ideas, and will prove more burdensome, time consuming, and expensive than beneficial. The Rate Bureaus refer to the *Rate Bureau Investigation*, where we rejected a verbatim transcript requirement, finding instead that the record failed to support a program of constant monitoring.

The Rate Bureaus submit that the Staggers Rail Act of 1980 adopts a limiting sound recording requirement and if Congress intended a similar requirement for motor carrier bureaus, it would have expressly provided for it. The Rubber Manufacturers suggest that imposition of a sound recording requirement should be instituted as a remedial measure, only upon a strong showing that a bureau has exceeded the boundaries of permissible activities. As an alternative, NITL suggests that the bureaus be required to file the minutes of their meetings, including the voting record on each docket, with the Commission. The minutes would be kept confidential.

We have decided against a sound recording program at this time. Our regulations at 49 CFR 1253.20 provide that every carrier organization operating under an approved agreement is required to maintain reports or minutes of all oral proceedings. These records must be filed and kept readily available for examination by Commission representatives.

In our notice, we expressed concern for the lack of definite remedies for proven rate bureau violations. We anticipated a need for immediate administrative remedies to assure the integrity and consistency of our regulation. In addition to the possible remedy of withdrawal of immunity for serious and continuing violations, we proposed to adopt a standard providing that proof of significant violations of an approved agreement will result in tariff rejection. Allegations of lesser violations would subject the tariff item to suspension or investigation.

The Rate Bureaus contend that the specific requirements of section 14 of the new act do not expressly provide for withdrawal of immunity. Rather, section 14 is said to provide continued immunity under previously approved agreements during the period new or amended agreements are being considered by the Commission. The bureaus infer that Commission action under section 10706 can do no more than determine whether or not an agreement qualifies for approval. As long as bureau agreements conform to section 14, the congressional grant of immunity allegedly protects "all parties and other persons with respect to making or carrying out the agreement."

The Rate Bureaus also oppose rejection or suspension and investigation as remedies for violations of rate bureau procedures. They argue that specific remedies are neither contemplated nor authorized by the act, and that the Commission lacks authority to create a new "remedy" for perceived violations of the antitrust law.

We believe that the bureaus' restrictive interpretation of our responsibilities is neither warranted by the act nor in keeping with the goals of the NTP.[8] The Commission's responsibilities under section 10706 do not preclude withdrawal of rate bureau immunity. As a practical matter, the power to grant approval implies a power to reconsider and withdraw the approval. Exercise of the power to reconsider and withdraw immunity is necessary if the Commission is to perform effectively its express duties under the act. Moreover, if we accepted the Rate Bureau interpretation, we would effectively be limiting section 10706(b)(3)(E) to antitrust proceedings. Since the section refers to "any proceeding" we think it is sufficiently broad to apply to rejection, suspension and investigation, and complaint proceedings provided the burden of proof falls on the party alleging rate bureau improprieties. *American Trucking Assns.* v. *United States*, 344 U.S. 298, 309-10 (1953), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Moreover, in *Atchison, Topeka & S. F. Ry. Co.* v. *Aircoach Transp. Assn.*, 253 F. 2d 877, 886 (D.C. Cir. 1958),[9] and *Luckenback Steamship Company* v. *United States*, 179 F. Supp. 605, 613 (1959)[10] the courts concluded that although the Commission does not have *exclusive* primary jurisdiction over questions of "5a" coverage whenever antitrust violations are raised, the agency may, nevertheless, make the first decision on such matters since it is charged with administering the statute under which the agreements were approved.

Pursuant to 49 U.S.C. 10762(e), the Commission is expressly authorized to reject tariffs published in violation of the act or our regulations. See *Acme Fast Freight, Inc. Common Carrier Application*[11]. The courts have concluded that regulatory agencies possess inherent authority to reject tariff matter and have construed that authority to extend beyond technical requirements of form and order. *Municipal Light Bds.* v. *FPC*, 450 F. 2d 1341, 1346 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

[8] The NTP constitutes substantive law to be implemented by the Commission. See *American Lines*, v. *L.&N.R. Co.*, 392 U.S. 571 (1968); *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *Need for Defining Reasonable Dispatch*, 351 I.C.C. 812, 829 (1976).

[9] Certiorari denied at 361 U.S. 930 (1960).

[10] Judgment partially vacated but antitrust phase affirmed at 364 U.S. 280.

[11] 17 M.C.C. 549 (1939), affirmed *sub nom. Acme Fast Freight* v. *United States*, 30 F. Supp 968 (1940), affirmed 309 U.S. 638 (1940).

We recently established a TIB[12] to act in those cases where our limited tariff examination program fails to identify unlawful tariff before they become effective.

In our notice, we proposed to reject tariffs when they were shown to have been adopted or published under procedures that violated rate bureau agreements. The TIB will entertain all allegations of rate bureau agreement violations. Those found to have merit will be submitted to the Office of Consumer Protection for detailed investigation. After receiving the results of this investigation the TIB may act or send its recommendations to the Commission for possible action. A shipper may file a verified complaint seeking to have tariff material stricken before, or within 60 days after, the effective date of the tariff.

In addition to seeking rejection, a shipper may seek suspension or investigation on the grounds of rate bureau agreement violations. As we have the power to strike or reject a tariff for these violations, we clearly have the power to take this less drastic action.

This process is obviously related to the strike mechanism. If a tariff suspended on the grounds of possible rate bureau violations is subsequently stricken, the suspension or investigation proceeding will be moot. On the other hand, a final decision not to strike for the reason that a clear violation has not been proven will leave the disputed tariff in place and thereby permit the continuation of the suspension or investigation proceeding.

Frequent rejections or formal proceedings in which rate bureau violations are proven for tariffs of a particular bureau may suggest a pattern of abuse which would warrant more serious study of a bureau under 49 U.S.C. 10706(b) and the NTP.

In addition to rejecting tariffs which have been adopted or published under procedures which violate approved agreements, we retain the option of referring the findings of any investigation into such violations to the antitrust enforcement agencies. We reiterate that the only permissable activity which enjoys immunity from the antitrust laws is that carried out under the detailed procedure in the agreement and bylaws. We intend to enforce vigorously compliance with these procedures so that the public may enjoy the benefits Congress anticipated when it enacted the rate bureau provisions of Public Law 96-296.

VI. Additional Considerations

This decision is intended to consolidate in one place all of our substantive regulations and interpretations with respect to motor carrier rate

[12] Ex Parte No. 367, *Tariff Investigation Board*, I.C.C. (decided September 27, 1979), modified, I.C.C. (decided September 25, 1980).

bureaus. Therefore, it is appropriate that we review previous Commission actions to determine which have been superceded by this decision

In our *Rate Bureau Investigation, supra*, we made 26 findings of fact regarding the operation of rate bureaus. Several of these findings, as they apply to motor carrier rate bureaus, are modified or reversed as a result of this decision. For instance, finding 13 decided that public notice of rate proposals need not identify the proponent. This finding has now been superceded by the requirements mandated for changing or canceling independently established rates. Finding 22 prohibited the rate bureaus from protesting the independent actions of their members. This prohibition has been expanded to embrace the independent action of any motor carrier. Findings 24 and 25 found the continuation of antitrust immunity to be in the public interest. The act essentially lifted the antitrust immunity with respect to zone rates and new released rates, and effective January 1, 1984, will lift immunity for single-line rates and all released rates.

To the extent that these and any other findings contained in the *Rate Bureau Investigation* are inconsistent with this decision they are reversed.

Several regulations in part 1331 of title 49 of the CFR entitled "Section 5a Applications,"[13] are modified or made inapplicable to motor carrier rate bureaus by this decision. While notice of particular changes to the CFR was not given in our August decision, it is clear that there was actual notice of the possibility of such changes. In fact, many commentors referred to our existing rules. Accordingly, we believe we may finalize repeal of inconsistent regulation concurrent with adoption of this new set of standard. The following sections generally provide the procedures for new rate bureau applications and remain applicable to motor carriers:[14]

49 CFR 1331.1 Form and contents of application.
49 CFR 1331.2 Required exhibits.
49 CFR 1331.3 Procedure.
49 CFR 1331.4 New parties to an agreement.

The intent of section 1331.5, Public Notice, has been discussed and incorporated in our new standards. It will be revised to appply to nonmotor bureaus.

Section 1331.6 as it applies to motor bureaus is repealed. Relevant portions of it are incorporated in this decision. It remains applicable to other than motor carrier rate bureaus and will be retitled, and other necessary

[13] The title and format of this part reflect the pre-4R Act statute when section 5a applied to all regulated carriers. The 4R Act created a new section 5b exclusively pertaining to rail carriers. Section 5b is recodified at 49 U.S.C. 10706(a), and section 5a is recodified at 49 U.S.C. 10706(b). Our rule changes reflect these amendments.

[14] Other rules, e.g., 49 CFR 1253.20, remain applicable.

conforming amendments made. (See concurrently issued Federal Register notice of final rules.)

VI. ULTIMATE FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, we find that the above interpretations and sample amendments are consistent with the congressional intent expressed in the new act and its legislative history and are within our authority to prescribe.

The following is a list of the Special Permission Authorities canceled. Any other permission of like impact are also canceled.

Name of agent	*Special Permission No.*
Rocky Mountain Motor Tariff Bureau, Inc	80-2711-M
Motor Carriers Traffic Association Incorporated	80-4413
Steel Carriers' Tariff Association, Inc	77-3130-M
Eastern Central Motor Carriers Association, Inc	80-2433-M
New England Motor Rate Bureau, Inc	80-2779-M
Central and Southern Motor Freight Tariff Association	80-2516-M
National Association of Specialized Carriers, Incorporated	80-4037
	81-0515
Central States Motor Freight Bureau, Incorporated	80-2518-M
Niagara Frontier Tariff Bureau, Inc	81-0499
Intermountain Tariff Bureau, Inc	81-0511
Western Motor Tariff Bureau, Inc	81-0500
Oil Field Haulers Association, Inc	81-0517
Southern Motor Carriers Rate Conference	80-2822-M
Middlewest Motor Freight Bureau	72-3559-M
	76-2509-M
Middle Atlantic Conference	80-2527
Ohio Motor Freight Tariff Committee	80-3227-M

This proceeding does not significantly affect the quality of the human environment or the conservation of energy resources and will not have an adverse impact on small business.

COMMISSIONER GILLIAM, concurring:

In my concurring opinion to the notice adopting interim rules and interpretations in this proceeding, I set out my preliminary views on the role of the Commission under section 14 of the Motor Carrier Act of 1980. My position was basically that the strict, self-executing standards exacted by the Congress are evidence of their intent to reduce the substantial discretion previously invested in the Commission to approve or disapprove agreements. After reviewing the comments filed in response to the notice, I remain convinced that my initial interpretation is correct. I believe this decision proves my point.

The majority's decision marks a retreat from the proposal contained in the notice. There are some valid interpretations made in the decision, but on the whole it provides very little guidance and merely traces the requirements of the statute. This is the main reason I am concurring in the result, because with one major exception, this decision will make no appreciable difference.

The one exception is the section on remedies for rate bureau violations which I discussed in my previous opinion. I do not believe the Commission has the authority under the statute to suspend and investigate rate proposals on the basis of alleged rate bureau violations. My reading of the statute is that the *status quo* remains unchanged in this area and that the exclusive remedy is disapproval of the agreements. As I stated before, if carriers do not adhere to the specific terms of their agreements then they are automatically operating without immunity subject to the operation of the antitrust laws, regardless of any action taken by the Commission. As far as tariff rejection on the basis of alleged violations is concerned, it is arguable that in egregious situations the Commission may be able to reject tariffs before they go into effect on these grounds.

I am already on record in Ex Parte No. 367, *Tariff Integrity Board*, as questioning whether tariff rejection after the fact is legally defensible. This is precisely the type of situation that I feared when I dissented in that case. Tariff rejection on the basis of antitrust violations carries with it severe consequences for carriers. This is not merely a technical publishing error that we are talking about, but the spector of antitrust prosecution that we are raising in summarily rejecting a tariff on this basis. I believe the Commission should stick to its area of expertise—transportation. We bring this expertise into play in the rate bureau area when we review agreements for approval based on compliance with the statutory standards and the goals of the transportation policy. There is an agency vested with the power to enforce the antitrust laws. It is the Justice Department not the Commission acting on our behalf. Congress has spoken on the question of rate bureaus. We should implement their intent and not attempt to increase our regulation whether it be through actual formal proceedings or through our enforcement efforts.

Issued under authority of Public Law 96-296, 49 U.S.C. 10321 and 10706, and 5 U.S.C. 553.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam. Commissioner Gilliam concurring with a separate expression. Commissioner Clapp reserves his right to submit a separate expression at a later date.

(SEAL)

AGATHA L. MERGENOVICH,
Secretary.

Ex Parte No. 297 (Sub-No. 5)
Appendix A

APPENDIX A

List of parties

1. Alaska Carriers Association, Inc.
2. Aluminum Association, Inc.
3. American Bakers Association
4. American Paper Institute, Inc.
5. American Retail Federation
6. American Trucking Associations, Inc.
7. Automobile Transporters Tariff Bureau, Inc.
8. Bureau of Competition, Federal Trade Commission
9. Bulk Carrier Conference, Inc.
10. Central and Southern Motor Freight Tariff Association, Inc.
11. Central States Motor Freight Bureau, Inc.
12. Grant M. Davis, Ph. D.
13. Department of Defense
14. Department of Transportation
15. Drug and Toilet Preparation Traffic Conference, Inc.
16. Eastern Central Motor Carriers Association, Inc.
17. Firestone Tire and Rubber Company
18. Georgia Freight Bureau, Inc.
19. Gulf Ports Association, Inc.
20. Heavy & Specialized Carriers Tariff Bureau
21. Household Goods Carriers' Bureau, Inc.
22. Middle Atlantic Conference
23. Middlewest Motor Freight Bureau
24. Mobile Transportation Rate Bureau, Inc.
25. Motor Carriers Traffic Association, Inc.
26. National Association of Specialized Carriers, Inc.
27. National Classification Committee
28. National Industrial Traffic League
29. National Small Shipments Traffic Conference, Inc.
30. New England Motor Rate Bureau, Inc.
31. Niagara Frontier Tariff Bureau, Inc.
32. Office of Special Counsel, Interstate Commerce Commission
33. Ohio Motor Freight Tariff Committee, Inc.
34. Oil Field Haulers Association, Inc.
35. Oxford Chemicals, Inc.
36. Pacific Inland Tariff Bureau
37. Rockwell International Corporation
38. Rocky Mountain Motor Tariff Bureau, Inc.
39. Rubber Manufacturers Association
40. Southern Motor Carriers Rate Conference
41. Steel Carriers' Tariff Association, Inc.
42. Western Motor Tariff Bureau, Inc.
43. Westinghouse Electric Corporation

INTERSTATE COMMISSION COMMERCE
Washington D.C. 20423

EX PARTE NO. 297 (SUB NO. 5)
MOTOR CARRIER RATE BUREAUS—
IMPLEMENTATION OF P.L. 96-29

December 30, 1980

NOTICE:

A decision and final rules by the Commission, decided December 19, 1980, is being served today. In that decision, Commissioner Clapp reserved his right to submit a separate expression.

Please amend your copies of the decision by including the following concurring expression of Commissioner Clapp.

COMMISSIONER CLAPP, concurring:

The discussion on remedies for potential violations of bureau agreements is confusing. It is doubtful that the elaborate tariff rejection process is necessary, assuming a meaningful Commission enforcement role. The possibility of antitrust prosecution is probably the strongest deterrent against potential abuse. This Commission, by active and even-handed oversight efforts, could, if necessary, hold fact-finding hearings and turn the results over to the antitrust enforcement agencies. More than this seems superfluous.

AGATHA L. MERGENOVICH
Secretary

NOTICE OF CLARIFICATION AND ERRATA

We are changing our order served December 30, 1980, because it does not accurately reflect the Commission vote in various respects. In addition, we are resolving ambiguities and inconsistencies, making minor editorial changes, and correcting typographical errors. 49 U.S.C. 10322(g)(1).

1. Page 1, line 2 of text, insert "(Act.)" after "Public Law 96-296."

2. Page 1, lines 5, 9, and 13 of text, change "act" to 'Act".

3. Page 3, line 34, change "act" to "Act".

4. Page 3, line 38, change "49 U.S.C. 10706(b)." to "49 U.S.C. 10706(b) and any unrelated new amendments."

5. Page 4, line 5, after "agreements." add the following paragraph:

Section 14(e) of the Act grants rate bureau interim antitrust immunity. To continue that existing immunity, Section 14(e) requires the bureaus to (1) comply with 49 U.S.C. 10706; (2) comply with the requirements of this decision, and (3) submit amended agreements to the commission for approval.

To meet these three conditions precedent, the bureaus shall take the following steps. Bureaus shall comply with 49 U.S.C. 10706 until this decision becomes effective, after which the bureaus shall also comply with this decision. On the date we have prescribed, bureaus shall file amended agreements reflecting 49 U.S.C. 10706 and this decision's requirements.

If all of these steps are taken in the prescribed sequence, the existing antitrust immunity will continue uninterrupted until the Commission finally disposes of the amended agreement.

6. Page 5, line 1, change "any" to "[A]ny".

7. Page 5, line 11, revise to read "action. [49 U.S.C. 1331.6(A)(1)]".

8. Page 5, line 15, change "carrier" to "carriers".

9. Page 5, line 40, change "which proposed rate increases that" to "whose rate increases".

10. Page 7, line 1, change "docketing" to "Docketing".

11. Page 9, line 16, change "actions" to "action".

12. Page 9, line 33, change "act's legislative history" to "Act's legislative history,".

13. Page 9, line 35, change "H. Rept." to "H.R. Rept."

14. Page 9, line 39, change "act' to "Act".

15. Page 10, line 1, change "act" to "Act".

16. Page 10, line 14, delete and insert "not docket the proposal until it has been filed with the Commission."

17. Page 10, line 16, change "advance" to "advance,".

18. Page 10, line 23, change "advantage" to "advantage,".

19. Page 10, line 36, delete and insert "effective date. The decision to file a similar independent action must be made, however, without dis-".

20. Page 11, line 16, change "The Bureau" to "They".

21. Page 11, line 23, change "On" to "In".

22. Page 11, line 33, change "act." to "Act."

23. Page 11, line 38, change "docketing" to "docketing,".

24. Page 12, lines 7 and 11, change "act" to "Act".

25. Page 12, line 27, delete "carrier".

26. Page 13, line 2, change "other" to "other,".

27. Page 13, line 19, change "act" to "Act'.

28. Page 14, line 16, correct spelling for "time".

29. Page 14, line 16, after "docketing." insert the following:

> In the absence of explicit instructions for handling and docketing from the proponent of an independent action, the bureau may not docket the item until the proposal has been filed with the Commission.

30. Page 14, line 17, change "before or after ICC filing." to "until they have become effective.".

31. Page 14, line 18, insert the following additional paragraph:

> When a carrier submits an independent action to the bureau and chooses to have the item docketed, notification will be given by the bureau to the same extent and in the same manner that the bureau gives notice of actions proposed under collective procedures.

32. Page 14, lines 44 and 45, and page 15 lines 1-5, should be printed in 8-point type.

33. Page 15, line 36, change "act" to "Act".

34. Page 15, line 40, delete "S. Rept., supra at 14."

35. Page 16, lines 3 and 14, change "H. Rept." to "H. R. Rept.".

36. Page 16, line 5, change "noted" to "notes".

37. Page 17, line 1, change "persuasive" to "persuasive,".

38. Page 17, line 9, after "carriers." insert "We will also continue the practice permitting shippers to obtain the assistance of rate bureau employees in developing and presenting tariff proposals."

39. Page 17, line 9, change "they" to "bureau employees".

40. Page 17, line 12, change "carrier(s) "to "party(ies)".

41. Page 17, line 13, change "initiates" to "initiate(s)".

42. Page 17, line 39, change "act." to "Act."

43. Page 18, line 5, after "member carriers" insert "or shippers" and after "a carrier" insert "or shipper".

44. Page 18, line 16, change "act." to "Act."

45. Page 19, lines 12 and 13, delete and insert the following

> venes. Charges and requirements for written requests to obtain this information are unacceptable. Under the Act, this information

46. Page 19, line 17, change "which" to "which vote".

47. Page 19, line 19, change "he" to "it".

48. Page 23, line 4, change "act." to "Act".

49. Page 23, line 8, delete "International".

50. Page 25, line 23, add "*".

51. Page 26, line 4, change "rates" to "rate".

52. Page 27, line 7, change "H.Rept" to "H. R. Rept." and "S. Rep." to S. Rept.".

53. Page 28, line 5, change "act" to "Act".

54. Page 28, line 22, after "delayed." delete remainder of paragraph and insert the following:

> Section 10706(b)(3)(D) states that section 10706 (b)(3)(B)(i)(II) only applies to general rate increases under the stated conditions. Apparently, general rate increases would be impossible as of January 1, 1981,

when the requirement of actual authority for voting becomes effective, unless the restrictions were observed. Literally, carriers without authority to participate in every rate affected by a general rate increase could not vote. This clearly was not contemplated by Congress, and we have no choice but to conclude that the restrictions in subparagraph (D)(i) must take effect immediately.

55. Page 29, line 31, "act" to "Act".

56. Page 29, lines 41 and 42, change "." to ":", begin on next line with "General" indented and in 8-point type.

57. Page 30, line 35, change "effect" to "effective".

58. Page 31, lines 18 and 29, change "H. Rept." to "H.R. Rept."

59. Page 31, line 39, change "filled" to "filed".

60. Page 31, line 34, change "nature" to "nature,".

61. Page 32, lines 2, 8, and 17, change "act" to "Act" or "Acts".

62. Page 32, line 6, delete "Moreover," and change "since" to "Since".

63. Page 32, line 7, change "offers" to "offers the".

64. Page 32, line 35, change "rates" to "rates,".

65. Page, 32, lines 35 and 36, change "established" to "established,".

66. Page 33, line 43, change "Commission" to "Commission,".

67. Page 33, line 11, delete, "however,".

68. Page 33, line 13, change "We" to "However, we".

69. Page 33, line 22, at the end of the sentence, add the following additional material:

In the absence of explicit instructions for handling from the proponent of an independent action, the bureau may not docket the item until the proposal has been filed with the Commission.

70. Page 34, line 2, change "H." to "H.R.".

71. Page 34, line 8, at the end of the sentence, add the following additional material:

Abuse of this exception could lead to withdrawal of Commission approval for the collective consideration of classification proposals.

72. Page 34, line 17, change "Activities" to "The activities listed above".

73. Page 34, line 33, change "act" to "Act".

74. Page 34, line 36, change "some" to "a".

75. Page 35, line 11, change "limiting" to "limited".

76. Page 35, line 34, change "act" to "Act".

77. Page 35, line 38, change "Commission action" to "the Commission".

78. Page 36, lines 3, 7, and 29, change "act" to "Act".

79. Page 37, line 2, change "unlawful tariff" to "unlawful tariffs".

80. Page 37, line 6, delete everything after "agreements." and insert the following material:

> The Tariff Integrity Board will entertain all allegations of rate bureau agreement violations. Those found to have merit will be submitted to the Office of Consumer Protection for detailed investigation. The results of this investigation and the Tariff Integrity Board's recommendations will be submitted to the Commission for possible action.

81. Page 37, line 26, change "a bureau" to "the bureau".

82. Page 38, line 13, change "act" to "Act".

83. Page 38, line 25, change "regulation" to "regulations".

84. Page 38, line 26, change "standard" to "standards".

85. Page 39, line 3, change "VI" to "VII".

86. Page 39, line 6, change "act" to "Act".

87. Page 39, line 5 of concurring opinion, change "exacted" to "enacted".

88. Page 41, line 1, change "Appendix A" to "Appendix".

89. Page 41, line 2, delete and insert "List of parties filing comments".

90. Page 44, lines 31, and 32, delete and insert the following new material:

> 5. The quorum for holding meetings at which rates, rules, or classifications are discussed or considered is 30 percent of the membership of the organization or 50 percent of the membership of the respective committee.

91. Page 44, line 38, insert the following additional material:

> 7. To retain antitrust immunity, the bureaus shall comply with 49 U.S.C. 10706 and this decision, when it becomes effective. Then, on the prescribed date, the bureaus shall submit for our approval agreements amended in accordance with 49 U.S.C. 10706 and this decision.

Dated: January 29, 1981

By the Commission, Chairman Gaskins, Vice Chairman Alexis, Commissioners Greshman, Clapp, Trantum, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION
DECISION
EX PARTE NO. 297 (Sub-No. 5)

MOTOR CARRIER RATE BUREAUS— IMPLEMENTATION OF PL 96-296

Decided: January 28, 1981

A petition for stay pending judicial review was filed by eleven major common carrier rate bureaus (Bureaus) on January 19, 1981, and a petition for stay pending administrative review was filed by the National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, Inc. (NASSTRAC/DTPTC) on January 9, 1981. Petitioners request that we stay the effectiveness of our decision of December 30, 1980, in which we issued final rules and standards under the new motor carrier rate bureau provisions of Section 14 of the Motor Carrier Act of 1980 amending 49 U.S.C. 10706.

To justify a stay pending judical review, petitioners must show (1) a substantial threat of irreparable injury absent a stay; (2) that they have a substantial likelihood of prevailing on the merits; (3) that a stay will not harm other parties interested in the proceeding; and (4) that a stay will not interfere with the public interest. *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977), *Canal Authority of State of Florida* v. *Callaway*, 489 F.2d 567, 572-73, (5th Cir. 1974); *Virginia Petroleum Jobbers Ass'n.* v. *Federal Power Comm'n.* 259 F. 2d 921, 925 (D.C. Cir. 1958).

Petitioners have not shown that they are likely to prevail on the merits. The Bureaus argue that the notice and comment provisions of the Administrative Procedure Act were not satisfied since the interim rules in our August 21, 1980 notice of proposed policy and notice of interim requirements established a quorum of at least 35 percent of the organization's membership and 35 percent of the Committee's membership, and our December decision adopted a 30 percent requirement for the organization's membership (which

the Bureaus supported) and a 50 percent requirement for the Committee's membership.

A notice of proposed rulemaking is sufficient if it provides a description of the subjects and issues involved in the rulemaking. *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 48 (9th Cir. 1967); *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 48-49 (D.C. Cir. 1976). Here, the Commissioner's interim rules fully advised the parties that the Commission was contemplating a quorum standard for rate bureaus, as required by the specific terms of 49 U.S.C. 10706(b)(3)(F). That notice described the subject of the rule—quorums—and the issues involved—ensuring that the quorum provided adequate memberships representation at meetings. The 50 percent quorum requirement is entirely reasonable since it ensures that a small number of carriers will not dominate committee meetings. In addition, the December 30th decision noted that individual Bureaus' requests for lower quorum requirements will be considered and granted where a genuine hardship is demonstrated.

The Bureaus also argue that the notice and comment provisions were not complied with in the December 30 order cancelling special permission orders. Special permission proceedings are not rulemakings, but informal adjudications under 49 U.S.C. 10762(d)(1). Cancellations can occur at any time and are effective immediately. In this instance, in any event, the Bureaus were given more than 30 days notice—to February 2, 1981—before the cancellations became effective. The APA's rulemaking provisions do not apply here.

The Bureaus state that the independent action rule is unlawful because Section 14 says nothing about the docketing of independent actions. This argument is without merit. The right of independent action has always been an absolute right. Prior to the Motor Carrier Act of 1980, 49 U.S.C. 10706(b)(2)(c) required rate bureau agreements to give each party "the absolute right" to take independent actions The Motor Carrier Act of 1980 did not change this absolute right but, if anything, emphasized the importance and unvarying nature of this right. (Dec. at 9).

The Bureaus' arguments concerning the tariff rejection rule are also without merit. Under the procedures set forth in our December decision, the Commission will only reject tariffs adopted in violation of the rate bureau agreement. This will be done upon complaint and the bureau will have an opportunity to be heard and a right of appeal. The Bureaus will not be prevented from establishing lawful rates but only rates formulated in violation of the antitrust laws.

Similarly, the rate bureau employee participation rule is consistent with the statute. The employees may provide expert analysis and technical assistance to a carrier in developing or evaluating that carrier's rate proposal. In a Notice of Clarification and Errata (Notice) served January 29, 1981, we clarified our December decision to allow shippers to obtain assistance from bureau employees in development tariff proposals.

Finally, the Bureaus criticism of the antitrust immunity issues has been mooted by the Notice (p. 6, No. 91). It should be noted, however, that we have no express or implied statutory authority to grant antitrust immunity for violations of rate bureau agreements even where we may accept for filing or approve particular rates, rules, or practices submitted by carriers if they are challenged by appropriate law enforcement authorities as violative of the antitrust laws.

NASSTRAC/DTPTC has also not demonstrated that it will prevail on the merits. It argues that the December 30 decision wrongfully restricts the right to comment on amended agreements and is internally inconsistent regarding notice and discussion of independent actions. The Notice corrects these problems. Shippers can comment on any bureau amendment to their agreement (p. 1, No. 4). The inconsistencies concerning independent action notice (p. 2, No. 16 and No. 29) and discussion of independent actions (p. 2, No. 30) have been clarified.

NASSTRAC/DTPTC contends that the December decision errs in not giving advance notice of independent action service increases or service restrictions and as a result it will be irreparably harmed. We find these arguments to be without merit. A carrier wishing to take an independent ac-

tion has always had the absolute right to file it through the bureau without advance notice. Moreover, the decision did not affect the statutory notice requirements and shippers have a 30-day protest period during which the Commission may decide to investigate and/or suspend the rate on the basis of arguments raised by the protests. Once a rate becomes effective, a shipper can file a complaint. If the shipper should unknowingly pay a higher but lawful rate than that of other cariers such injury can only last until the shipper receives its freight bill. In the competitive environment created by the Motor Carrier Act of 1980, carriers with lower rates have the opportunity and can be expected to use lower rates to solicit traffic from carriers with higher rates, in any event, a carrier's lawfully established rates create no legally cognizable injury, even if those lawful rates exceed other equally lawful rates.

The Bureaus have also not shown that they will suffer irreparable injury absent a stay. As has been shown, they have not shown irreparable harm because of a violation of their procedural rights under the APA. The only other argument the Bureaus advance is that they would be injured by acceding to a Commission order which they believe to be unlawful. Such an argument, of course, totally lacks merit since mere disagreement with an agency decision does not constitute the irreparable harm that justifies a stay.

Finally, the petitions for stay must be denied since a stay would substantially harm other parties and be contrary to the public interest. Despite the contentions of the Bureaus. only two shipper groups, for limited reasons, support a stay. Other shippers would suffer harm by issuance of a stay. Nor can we accept the Bureau assertion that since they are in compliance with Section 14 of the Motor Carrier Act, the public will not be injured by a stay. As can be seen by the different interpretations of Section 14 by the Commission and the Bureaus, that section is not totally self-executing. This agency, however, is entrusted with determining where the public interest lies, and we would be abrogating our responsibilities by allowing the Bureaus' interpretations of the Motor Carrier Act to govern.

NASSTRAC/DTPTC has also failed to show that a stay would not harm other parties and is not contrary to the public interest. Their only argument is that the independent action notice rule will reduce shippers' knowledge of rate increases and thus is contrary to the Congressional goal of economical transportation service. We believe that our December decision will ensure economical transportation through means Congress has approved: a substantial increase in the competitive environment in the Motor Carrier industry. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 3/1980). The Commission's notice rule permits carriers to compete in the ways they consider best and places heavy reliance on marketplace forces to protect shippers as Congress directed. (Dec. at 12). By reaffirming the carriers' right to use the pricing mechanism they wish, the Commission's decision will serve the public interest.

IT IS ORDERED:

The petitions for stay are denied.

By the Commission, Darius W. Gaskins, Jr. Chairman.

AGATHA L. MERGENOVICH
Secretary

Served May 11, 1981

31313

INTERSTATE COMMERCE COMMISSION

EX PARTE NO 297 (SUB-NO 5)

MOTOR CARRIER RATE BUREAUS—IMPLEMENTATION OF PL 96-296

Decided April 27, 1981

Petitions to reopen and reconsider granted in part. Certain clarifications offered.

Appearances as shown in prior decision.

DECISION

BY THE COMMISSION:

The National Association of Specialized Carriers, Inc. (NASC), the National Small Shipments Traffic Conference jointly with the Drug and Toilet Preparation Traffic Conference (NASSTRAC/DTPTC), and various motor carrier rate bureaus (Bureaus)[1] have petitioned pursuant to 49 CFR 1100.98(d) for reopening and reconsideration of our decision served December 30, 1980.[2]

We are persuaded that the decision should be reopened and modified in certain aspect.[3] We will, also respond to a number of issues raised in the petitions and make clarification of our earlier decision as necessary. Issues raised in the petitions and not addressed here were considered and were concluded properly and adequately resolved in the prior decision as supplemented by the Notice.

ADVANCE NOTICE OF INDEPENDENT ACTIONS

NASC, NASSTRAC/DTPTC, and the Bureaus allege that the December decision is materially in error because it wrongly concludes that 49

[1] Central and Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, National Classification Committee, New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carrier Rate Conference.

[2] On January 29, 1981, we issued a Notice of Clarification and Errata, referred to here as the Notice. That document addresses a number of the issues raised in the petitions.

[3] NASSTRAC/DTPTC request than we delete a sentence, attributed to them, which asserts that a total prohibition against bureau protests and complaints is discretionary (decision p. 15). The sentence beginning with "Contrary * * *" and ending with with " * * * matter." (lines 10 and 11) is to be struck from the prior decision.

CFR 1331.5's advance notice procedure need not be mandatory when carriers adjust rates independently. They aruge that our December decision, in effect, reversed 1331.5 and cannot be justified under provisions of the act, as amended, which clearly contemplate a continuation of past rules covering independent actions (IA's).

We disagree. As pointed out in our December decision and clarified in our Notice (p. 2-No. 31), if notice of an IA is given, the public and the carriers will receive it at the same time. It is equality of notice which 1331.5 prescribes and which the December decision retains. The argument that the December decision is internally inconsistant regarding bureau docketing actions when a carrier has not given specific instruction was adequately addressed in the Notice (p. 2, Nos. 16 and 29).

Rate Increases

NASSTRAC/DTPTC also contend that the December decision fails to protect the rights of shippers and the public in not requiring advance notice of independent actions increasing rates or restricting available service. This issue, however, was directly addressed in our December decision and also discussed in our denial of the petitions for stay. The stay decision (p. 2), served January 29, 1981, discusses the procedural remedies available to shippers. Moreover, both decisions describe the congressional intention to reply on marketplace forces to protect shippers and the public (decision, p. 12 and stay, p. 3).

Special Permissions

NASC and the Bureaus argue that cancellation of the special permission orders authorizing short notice publication of rate changes is unlawful because it was done without notice. However, the stay decision (p. 2) points out that special permission authorizations (which are, from a procedural standpoint, informal agency actions) may be withdrawn at any time and that, in any event, the Bureaus were given more than 30 days' notice but failed to show the cancellation inappropriate.

Recording Devices

NASC contends that allowing recording devices to be used at bureau meetings constitute material error. We disagree.

The December decision (p. 18) responds to the clear congressional concern that rate bureau meetings be open in order to ensure adequate public monitoring of collective actions. In our view, this outweighs speculation that recordings could be used in frivolous litigation. There are adequate legal safeguards to prevent that from becoming a reality.

QUORUMS

Next, the Bureaus and NASC criticize our prescription of quorum percentages. The Bureaus contend that the 50-percent requirement for committee membership is unworkable. While we are not persuaded by the criticisms of inadequate notice and lack of flexibility that (the December decision (p. 22) provides for relaxation of the quorum standards where genuine hardship exists), we have been persuaded that the 30-percent requirement is appropriate for committee, as well as general meetings. The prior decision is amended accordingly. It is, thus, unnecessary to address NASC's request for interpretation.

SINGLE-LINE RATES

NASC and the Bureaus challenge the December decision's interpretation (at pp. 25-27) of 49 U.S.C. 10706(b)(3)(D)'s effect on single-line rates. They contend that the inclusion serves no useful purpose, ignores Congress' intention to have the Motor Carrier Ratemaking Study Commission (Study Commission) resolve this issue, and is prejudicial.

In our view Congress did not intend to preclude totally our discussion of this section. Indeed, we note that 49 U.S.C. 10706(b)(4) permits us to issue regulations implementing 10706(b)(3)(D), once antitrust immunity is terminated. The December decision clearly provides only our interpretation of 49 U.S.C. 10706(b)(3)(D) for the public's understanding of our position. Given the role of the Study Commission, our decision does not purport to resolve with finality the underlying issues.

GENERAL INCREASES AND DECREASES AND TARIFF STRUCTURE CHANGES

NASC and the Bureaus also question the December decision's handling of general increases and decreases. They argue that our decision misreads 49 U.S.C. 10706(b)(3)(D)(i) and implements it prematurely.

We find these concerns unjustified. In our Notice (p. 4, No. 54) we clarified our views regarding the (D)(i) restrictions' present applicability and stated our belief that they are immediately effective. It is clear that Congress did not intend that the limitation on voting to those with actual authority to participate in the transportation to which a rate applies would eliminate general rate increases. The language of section 10706(b)(3)-(D) indicates that this is true only so long as the (D)(i) restrictions are observed, however.

Another related issue raised by petitioners involves the limitation on discussions of general increases or decreases and tariff structure changes to regional industry average carrier cost information. Petitioners argue

that, because a bureau is composed of carriers operating nationally, it is inappropriate to limit discussions to regional cost data.

In our prior decision, at pages 29 and 30, we discussed this issue and concluded that industry (and, therefore, national) average cost discussions also are permitted by the statute. Inadvertently, the sample amendments use the phrase "regional industry average cost." As the word "regional" should not have appeared, we now strike it.

We appreciate NASC's concern in this area. We had no intention to limit a bureau's discussion more narrowly than the scope of its agreement. We realize that a bureau such as NASC, with its scope defined by type of transportation rather than by geographic boundaries, has a clear need to discuss more than regional industry average costs.

At the same time, however, we believe API's concern (decision, p. 29) is a valid one. Bureaus should take care that the cost data they submit are representative of the needs of that bureau's membership.

The alleged inconsistency in our method of calculating the 15-day notice period for general increase proposals (decision, p. 29) compared to the 120-day compliance period (decision, p. 23) misunderstands our intent. Our discussion of the 15-day requirement was intended to exclude only those Saturdays, Sundays, or legal holidays falling on the 15th day. We did not intend to eliminate all weekends and holidays from the 15-day computation. Under the statute, 15 calendar-days must elapse before the general increase proposal discussion notice requirement can be fulfilled.

ZONE OF FREEDOM AND RELEASED RATES

All three petitioners challenge the December decision's findings (at pp. 31-33) relating to independent actions under the zone of freedom and the released rates provision (49 U.S.C. 10706(b)(3)(c)). NASC contends that advance notice is required under 49 CFR 1331.5 and does not chill competition. This argument, however, ignores the congressional intent in 10706(b)(3)(c) to insulate actions taken under this section from collective consideration (decision, p. 31). The discretion authorized in our decision helps to ensure that actions taken under the zone are not collective.

NASSTRAC/DTPTC request clarification of the December decision's statement that carriers should consult with and provide information regarding released rates to shippers in advance. We envision carriers consulting with shippers and agreeing in advance to particular released rates. Advance agreement is necessary if a carrier proposes to eliminate full value rates. On the other hand, no shipper approval is required (although we would still encourage it) if a new released rate will alternate with

existing full value rates. We see no need to establish detailed requirements regarding the negotiations.

The Bureaus disagree with the December decision's interpretation of what constitutes a "new" as opposed to an existing released rate (decision, pp. 32-33). They argue that our interpretation is contrary to the Motor Carrier Act of 1980 and was established in contravention of 5 U.S.C. 553(b)(A). However, as we stated in our stay decision, a notice of proposed rulemaking is sufficient if it provides a description of the subjects and issues involved in the rulemaking. *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 48 (9th Cir. 1967); *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 48-49 (D.C. Cir. 1976). Here the public was informed that we were considering issues involved in implementing the released rate provision. A description of what constitutes a new or changed released rate was an integral part of this implementing process and could reasonably be expected. Finally, we cannot agree that Congress precluded our interpretation of this section. A discussion of its ramifications was necessary in determining where the public interest lies. In implementing this section, an interpretation of what constituted a new released rate was unavoidable. The Bureaus' arguments do not convince us that our definition is improper.

10706 UNRELATED NEW AMENDMENTS

NASSTRAC/DTPTC charge that the December decision limits shipper comments on proposed amendments to bureau agreements solely to those amendments implementing section 10706. However, as stated in our Notice (p. 1, No. 4), interested parties may also comment on "any unrelated new amendments." Thus, comments addressing any nonsection 10706 proposed amendment will be accepted and reviewed.

49 CFR 1331.6

NASSTRAC/DTPTC criticize the December decision (p. 38) as having repealed 49 CFR 1331.6 when its abolition would render p. 5 of the decision unintelligible. However, the decision at p. 38 provides that "relevant portions of it are incorporated in this decision." At page 5, we specifically incorporated the section 1331.6 definition of independent action rates as well as its requirements for changing these rates.

DEFINITION OF NOTICE

NASSTRAC/DTPTC believe that adequate notice of bureau meetings (decision, p. 18) should be defined. They suggest that to be reasonable, notice should be at least 14 days if by first-class mail and 10 days if a more expeditious form of notice is used.

We believe it unnecessary at this time to define the term "reasonable notice." What is reasonable will depend on the particular circumstances surrounding a proposal. Because of the interest expressed by NASSTRAC/DTPTC in this issue, however, we note that typically, bureaus give no less than 15 days' notice of items being considered for collective action, and we believe this is reasonable.

PROXY VOTING

The Bureaus criticize the December decision's (at pp. 20-21) implementation of the act's proxy voting provision, 49 U.S.C. 10706(b)(3)-(B)(vi). They contend that our implementation renders proxies useless in situations where a proposal is amended, and thus, our implementation is inconsistent with the congressional affirmation permitting proxy voting.

We disagree. Proxy voting is not eliminated but circumscribed in conformance with the congressional mandate that ratemaking result from an individual carrier's appraisal of the demand for and cost of its particular services. Proxies may indicate the breadth of the carrier's position, i.e., to what extent it would approve an amendment.

BURDEN OF PROOF AND EFFECT OF VIOLATIONS

The December decision (at pp. 34-37) properly delineated the factual presentation necessary to demonstrate a violation of this section. The decision's description of violation remedies, including the use of the Tariff Integrity Board (TIB) to reject tariffs, is criticized by the Bureaus as exceeding our delegated authority.

We find that the Bureaus' contentions regarding burden of proof and effect of violations under 49 U.S.C. 10706(b)(3) are without merit. Our Notice (p. 5, No. 80) clarifies the TIB's role in enforcing 10706(b)(3). Under the December decision's procedures and as stated in the stay decision (p. 2), tariffs violating rate bureau agreements will only be rejected upon complaint. TIB procedures provide the Bureaus with a full hearing and appeal rights. In our view, the December decision properly describes our authority to reject tariffs (decision, p. 36) adopted in violation of rate bureau agreements.

This decision will not significantly affect the quality of the human environment or conservation of energy resources.

COMMISSIONER CLAPP, concurring in part and dissenting in part:

As my concurrence to the decision served December 30, 1980 notes, a meaningful Commission oversight and enforcement role would make the elaborate tariff rejection mechanism unnecessary. There is reason to believe, however, that we inadvertently have hindered an effective over-

sight effort by eliminating a docketing requirement for rate increases published as independent actions in bureau tariffs.

The practical ability of shippers to protest tariff increases helps discourage potential pricing abuses before the fact. Shippers rely heavily on the rate bureau docket bulletins as a relatively inexpensive source of information (compared to the cost of subscribing to all bureau tariffs) about these independent action increases. As a result, the elimination of a docketing requirement for rate increases has impaired the practical ability of shippers to protest parallel (even if not simultaneous) rate hikes and other tariff adjustments that are not truly independent, even though they are labeled as such. Ironically, this works at cross purposes with a primary goal of the Motor Carrier Act of 1980—the encouragement of independent pricing based on individual carrier initiative.

The elimination of a docketing requirement for independent action rate decreases should enhance competition because individual carriers will have every incentive to use the most effective means of advertising possible (be that the docket bulletin or some other mechanism). However, the incentive to publicize rate increases before the fact is not nearly as strong. For the present, the elimination of required docketing of independent action increases should be limited to those published under section 10708(d)'s zone of rate flexibility. Since the statute does not permit those increases to be challenged as unreasonably high there is a limited need for a right of protest, and experience with filings under the zone will provide a sound empirical basis for evaluating the need for any additional steps.

It is ordered:

The proceeding is reopened and the petitions for reconsideration are granted to the extent discussed in this decision. In all other respects, the petitions are denied.

In accordance with our notice served February 27, 1981, new or amended agreements must be filed 15 days from the service date of this decision. Interested parties then have 45 days to file comments on the proposed agreements, and the Bureaus may reply within 20 days.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam. Commissioner Gilliam concurred in the result. Commissioner Clapp concurred in part and dissented in part with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

364 I.C.C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7674

Ex Parte No. 297 (Sub No. 5)

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS,

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and HOFFMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the petition of American Trucking Associaton, Inc., Et Al. for review of an order of the Interstate Commerce Commission; and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission in this cause be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART; and that this cause be, and the same is hereby, REMANDED to the Interstate Commerce Commission in accordance with the opinion of this Court;

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*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

It is further ordered that petitioners be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court; and that respondents be condemned to pay one-half of said costs.

OCTOBER 12, 1982

ISSUED AS MANDATE: FEBRUARY 4, 1983

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7674

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.,
PETITIONERS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

[Jan. 7, 1983]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion ....., 11 Cir., 198 ,____ F.2d).

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and HOFFMAN*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local

Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

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*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX E

1. 49 U.S.C. (Supp. IV) 10706 provides in pertinent part:

* * * * *

(b) (2) As provided by this subsection, a motor common carrier of property providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

(3) Agreement submitted to the Commission under this subsection may be approved by the Commission only if each of the following conditions are met:

* * * * *

(B) Any organization established or continued under an agreement approved under this subsection must comply with the following requirements:

(i) subject to the provisions of subparagraphs (C) and (D) of this paragraph, (I) the organization may allow any member carrier to discuss any rate proposal docketed, but (II) after January 1, 1981, only those carriers with authority to participate in

the transportation to which the rate proposal applies may vote upon such rate proposal;

(ii) the organization may not interfere with each carrier's right of independent action and may not change or cancel any rate established by independent action after the date of enactment of this subsection, other than a general increase or broad rate restructuring, except that changes in such rates may be effected, with the consent of the carrier or carriers that initiated the independent action, for the purpose of tariff simplification, removal of discrimination, or elimination of obsolete items;

(iii) the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier of property;

(iv) the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers;

(v) upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

(vi) the organization may not allow a carrier to vote for one or more other carriers without specific written authority from the carrier being represented; and

(vii) the organization shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed, except that if unusual circumstances require, the organization may extend such period, subject to review by the Commission.

(C) No agreement approved under this subsection may provide for discussion of or voting on rates to which the provisions of section 10708(d) or 10733(b) of this title apply, except that rates established or

filed under section 10730 of this title before the date of enactment of the Motor Carrier Act of 1980 or changes with respect to such rates may be discussed or voted on under agreements approved under this subsection until January 1, 1984.

* * * * *

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

2. 49 U.S.C. (Supp. IV) 10762 provides in pertinent part:

(a) (1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under

a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

* * * * *

(c) (2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section.

(d) (1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

* * * * *

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

3. 49 U.S.C. (Supp. IV) 11701 provides in pertinent part:

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with the subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation * * *. The Commission may dismiss a complaint it determines does not state responsible grounds for investigation and action.

* * * * *

4. 49 U.S.C. (Supp. IV) 11705 provides in pertinent part:

* * * * *

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages substained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

* * * * *

Office-Supreme Court, U.S.
FILED
AUG 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 7, 1983
CERTIORARI GRANTED JUNE 20, 1983

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[1] The opinion and judgment of the court of appeals and the relevant decisions of the Interstate Commerce Commission are printed as appendices to the petition for a writ of certiorari filed in this case and will not be reprinted in this Appendix.

RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings	80-7674

8/29/80 Flg. Petition for Review of Order of ICC & USA.

9/3/80 Flg. Motion of Ohio Motor Freight Tariff Committee, Inc. for leave to intervene.

9/3/80 Flg. Motion of Household Goods Carriers' Bureau, Inc. for leave to intervene.

9/3/80 Flg. Motion of Steel Carriers' Tariff Assn., Inc. for leave to intervene.

9/8/80 Flg. Motion of National Small Shipments Traffic Conference, Inc. & Drug & Toilet Preparation Traffic Conference, Inc. for leave to intervene.

9/8/80 Flg. Motion of Bulk Carrier Conference, Inc. for [leave] to intervene.

9/9/80 Flg. Motion of Heavy & Specialized Carriers Tariff Bureau for leave to intervene.

9/12/80 Flg. Motion of Alaska Carriers Assn., Inc. for leave to intervene.

9/16/80 Petitioners' Motion for stay pending appeal.

9/23/80 Flg. Memo of ICC in opposition to petitioners' motion for stay pending judicial review. (CE)

9/24/80 Flg. Motion of Ohio Motor Freight Tariff Committee, Inc. for stay pending review.

9/24/80 Flg. Motion of Household Goods Carriers' Bureau, Inc. for stay pending review.

9/24/80 Flg. Motion of Steel Carriers' Tariff Assn., Inc., for stay pending review.

9/24/80 Flg. Motion of Heavy & Specialized Carriers Tariff Bureau, etc. for stay pending review.

9/24/80 Flg. Motion of Alaska Carriers Assn., Inc., for stay pending review.

Date	Filings—Proceedings	80-7674

9/24/80 Flg. Motion of Nat'l Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc., for stay pending review.

9/24/80 Flg. Memo in support of Nat'l Small Shipments, etc., et al for stay pending review.

9/25/80 Flg. Motion of Bulk Carrier Conference, Inc. for stay pending review.

9/26/80 Flg. Motion of National Assn. of Specialized Carriers, Inc., for leave to intervene.

9/29/80 Flg. Memorandum of respondent Interstate Comm. Commission in opposition to intervening petitioners' motion for stay pending review.

10/2/80 Flg. Motion of Motor Carriers Traffic Assoc., Inc. to intervene as a petitioner.

10/1/80 Flg. Memo of respondents reply in opposition to intervening petitioners' motion for stay pending judicial review.

10/6/80 Flg. Order GRANTING motions of Ohio Motor, Et Al. for leave to intervene; it is further ordered that the motions of Petitioners and Petitioners-Intervenors for a stay pending review are GRANTED. (JCG, PA)

2/3/81 Flg. ORDER (1) GRANTING pet. mot. to amend petition for review to embrace order of the I.C.C. issued 12/30/80 in the same case; (2) GRANTING pet. mot. for leave to file reply to I.C.C.'s memo. in opposition to mot. [to] amend stay; (3) DENYING pet mot. to amend this Court's stay order entered 10/6/80, to embrace the order of the I.C.C. issued 12/30/80; (4) DENYING intervenors' mot. to stay the order of the I.C.C. issued 12/30/80; (5) respondents' mot. to dismiss the pet. for review is CARRIED WITH THE CASE insofar as it relates to the order of the I.C.C. issued 8/21/80, and in all other respects is DENIED; (6) GRANTING respondent mot. for ext. of time in which to file brief to and incld. 30 days from the date of this order. (JCG, PAK, JWH)

Date	Filings—Proceedings	80-7674

3/15/82 Case Assigned for 4/19/82 Atlanta Hearing Panel JCG-RLA-Hoffman

4/19/82 Case Argued

10/12/82 Opinion Rendered JCG Aff'd in pt., Reversed in pt. & Remanded

12/1/82 Petition for Rehearing (P) (G) Appellant En Banc

12/17/82 Response of ICC

1/7/83 Order Denying Rehearing

Service Date
Aug. 21, 1980

EC
FR-7035-01

TITLE 49—TRANSPORTATION

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

PART 1331—SECTION 5a APPLICATIONS

EX PARTE NO. 297 (Sub-No. 5)

MOTOR CARRIER RATE BUREAUS—IMPLEMENTATION OF PL 96-296

AGENCY: Interstate Commerce Commission

ACTION: Notice of Proposed Policy and Notice of Interim Requirements

SUMMARY: Section 14 of the Motor Carrier Act of 1980 imposes a number of new requirements and standards on motor carrier rate bureaus as a condition to their continued immunity from the antitrust laws. In this proceeding, the Commission will interpret and implement these new provisions. Interpretations contained in this notice are imposed on an interim basis. Amendments to existing rate bureau agreements or new or revised agreements must be filed within 120 days of enactment. At the same time, comments on the interpretations and proposed conditions are invited. Final standards will then be set. Once this phase of the proceeding is completed, the Commission will undertake review of each revised agreement to determine whether it meets all statutory requirements.

DATES: An original and 15 copies of comments must be filed with the Commission on or before 45 days from the date of this publication in the Federal Register.

ADDRESS: Comments should be sent to:

Room 5340
Interstate Commerce Commission
Washington, D.C. 20423

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder or Jane F. Mackall
(202) 275-7693 (202) 275-7656

SUPPLEMENTARY INFORMATION

Motor carrier rate bureaus may be granted antitrust immunity to determine collectively motor carrier rates rules, practices, etc., provided that the agreements under which they function have been approved by the Interstate Commerce Commission. Approval of agreements hinges upon compliance with certain statutory requirements and rules promulgated by the Commission. P.L. 96-296, the Motor Carrier Act of 1980, has made a number of changes in the permissible scope of rate bureau agreements. These changes are quite broad and take many different forms. Some require little or no interpretation. Others leave to the Commission establishment of standards for their implementation. Some are effective immediately; others postponed to future years.

With the exception of certain limited areas, Congress did not authorize delay in implementation of these important changes. We find it necessary to adopt interim rules and conclude that notice of the interim rules would be impractical and contrary to the public interest. In fact, Section 14(e) of this legislation requires interim compliance, pending our final action on each agreement. Compliance, in certain cases, requires interpretation of the new language. Our experience under the 4R Act dem-

onstrates the importance of making our interpretations of new statutory provisions effective as soon as possible. Thus we are requiring interim compliance with the new standards, as interpreted in this decision.[1]

At the same time, the bureaus and other interested persons will have the opportunity to comment on our interim interpretations. As will be seen in our discussion of each new requirement, the need for interpretation is in most instances minimal. In some cases, the legislation reflects prior Commission findings and rules. In other cases, e.g., quorum standards, our interpretations are designed to be consistent with present bureau activities and should not be controversial. Under Section 14(e), violations of these interim standards and interpretations are grounds for immediate consideration of withdrawal of immunity.

Following our review of the comments, we will issue final standards. Section 14(e) provides 120 days for the filing of new or amended agreements. This should provide adequate time for us to finalize these standards before amendments are filed. Revisions will be required only to the extent that final rules change existing agreement provisions. Any agreement that is not amended within 120 days to conform to our final standards could be immediately considered for termination. To simplify the amendment process, we are offering sample amendments that bureaus may consider.[2] The exact wording of our samples need not be adopted. However, in any case where we do not believe the amendment conforms to our final interpretation, we will disapprove the proposed agreement and consider terminating the existing one. Compliance with our findings at these two stages will ensure continued antitrust immunity through the first phase of this proceeding.

---

[1] To the extent necesary, we are also ordering changes in by-laws. By-laws must be consistent with our interpretations.

[2] Not all of the new provisions need be applicable to each bureau. Amendments will be required only in those areas applicable to a bureau's activities.

Implementation of the specific restrictions set out in new § 10706(b)(3) does not, by itself, fulfill the Commission's statutory obligations in this area. Under the standard of review of § 10706(b)(2), the Commission is directed to approve collective ratemaking agreements, if all specific statutory conditions are fulfilled, unless it finds that any such agreement is inconsistent with the National Transportation Policy (NTP). Moreover, the Commission may require compliance with any reasonable conditions to assure that the agreement furthers this transportation policy.

In the second stage of this proceeding, all agreements will be reviewed in light of the NTP as well as their compliance with specific sections of the Act. It is clear that even if a bureau is in compliance with § 10706(b)(3), continued immunity is not automatic. Therefore, in this second stage we will consider, for each bureau, the need for continued immunity under the standards of § 10706, including § 10706(b)(2).

Comments on our approach in this second stage are not requested at this time and will not be considered. At this point, we are concerned with implementing the specific restrictions contained in the revised statute. Our discussion of the second stage is included now only to give parties an overview of our intentions in the rate bureau area and to give advance notice that compliance with this first stage will not necessarily guarantee immunity in the future.

The Commission has terminated the proceedings in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements under Section 5a of the Interstate Commerce Act*, and in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5A Application Proceedings to Take Additional Evidence*. However, we take official notice of the comments submitted on the record in those proceedings where they are relevant to the proposals at issue here.

In addition, we take official notice of the comments made by the Federal Trade Commission (FTC) in its

petition filed December 18, 1979, to reopen the record in Ex Parte No. 297 (Sub-No. 4), to the extent that that petition is relevant to the issues involved in this proceeding. We originally allowed parties 90 days to reply to the FTC's petition but have recently postponed this due date. We will permit parties to address the matters raised in that petition to the extent they remain relevant as a part of their comments in support of their new agreements in the second stage of this proceeding.

We will now proceed to a discussion of the specific changes for which amendments must be filed. While certain of the changes are not effective immediately, we are requiring amendments to conform to the legislation on these matters as well. This will avoid further fragmentation of the proceeding.

• • • • •

IV. BURDEN OF PROOF OF VIOLATIONS AND EFFECT OF VIOLATIONS

§ 10706(b)(3)(E) provides:

> In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing [of] parallel behavior does not satisfy that burden by itself.

The section places the burden of proof upon the party alleging violation to show that the alleged event occurred. The reference to "parallel behavior" (behavior of one or more parties that is similar or identical but absent proof of intent by the party to agree upon a rate) means that it is not enough to show that the carrier ultimately published the same rate. Obviously, this proof is extremely difficult. In order to ensure compliance, the Commission must rely, to a great extent, on shipper monitoring of

bureau and carrier activities. The open meeting requirement will certainly assist in this task. However, we believe it would be unduly burdensome to require shippers to attend all meetings. We believe some sort of record-keeping requirement is necessary to ensure adequate access to necessary information. In the interim, bureaus will make sound recordings of all meetings and maintain them for the Statute of Limitations period. Typed transcriptions of these recordings must be made available for purchase, upon request. The purchase price should be no more than the cost of reproduction. The recordings must also be made available for use at bureau offices. We seek comments on this as a final standard. Another alternative which must be considered is a transcript requirement. As this could be more expensive than sound recordings, we have chosen the latter as the interim standard.

One troublesome aspect of past regulation of rate bureaus has been the lack of definite remedies for proven violations. In addition to the obvious potential remedy of withdrawal of immunity when serious and continuing violations occur, we propose to adopt a standard that provides that proof of significant violations of an agreement (*i.e.*, actions outside the scope of permissible activities) will automatically result in tariff rejection. If the allegations of improper activity are not sufficient to warrant rejection, they will be considered as grounds for suspension or investigation of the tariff item. Rejection, suspension, or investigation for actions beyond the scope of permissible bureau activity, should not be viewed as restricting other remedies under the antitrust laws. This procedure merely will provide an immediate administrative remedy which will ensure the integrity and consistency of our regulation, to the extent rate bureau activity affects matters before us.

We seek comments on this approach and invite presentation of alternate solutions to this issue.

Sample Amendment

Transcripts (or sound recordings) of all meetings will be made and kept available for viewing at the bureau. Copies of transcripts (or sound recordings) are available for purchase.

V. CONCLUSIONS

Oral hearings do not appear to be necessary at this time and none are contemplated. Anyone wishing to present views and evidence, either in support of or in opposition to these proposals, is invited to submit written data, views, or arguments within 30 days. While actual rules have not been proposed, this notice provides adequate notice of contemplated actions. We are not yet certain whether all these changes warrant rules in the CFR. § 10706(b)(3)(F), for example, seems to require regulations. Other statutory provisions are self-executing. While we recommend selective adoption of rules, an argument can be made that it is useful to have a complete set of regulations. We seek comment on this issue. In any case, existing rules (similar or different from P.L. 96-296) will be repealed or amended to conform to the new law.

We anticipate that final standards or rules will be completed in time to permit revised agreements to be filed within 120 days of enactment. If we are unable to meet this timetable, revised agreements consistent with this notice will be required.

It does not appear that this action will affect significantly the quality of the human environment or conservation of energy resources. However, comments on this issue are also invited.

Authority: P.L. 96-196, 49 U.S.C. 10321, 10706, 5 U.S.C. 553.

Decided: August 1, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis and Gilliam. Commissioner Gilliam concurring with a

separate expression. Vice Chairman Gresham dissenting in part with a separate expression. Commissioner Stafford dissented with a separate expression.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

COMMISSIONER GILLIAM, concurring:

In the Motor Carrier Act of 1980, the Congress has provided the Commission with specific guidelines for approving collective ratemaking agreements. The new statute requires that the Commission approve any agreement conforming to the restrictions imposed under the statute, unless we determine that the agreement is inconsistent with the transportation policy. The legislative history reveals that Congress specifically intended to reduce the substantial discretion previously invested in the Commission to approve or disapprove rate bureau agreements. In reference to Section 14, the House Report states that "This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits." In this regard, the Report emphasizes that the legislation is not designed to eliminate rate bureaus. The creation of an independent Study Commission to examine the need for continued antitrust immunity is further evidence that the Congress and not the Interstate Commerce Commission will decide the ultimate fate of the rate bureaus.

The interim interpretations adopted here exceed the parameters imposed by the Congress on our discretion in the following ways. Before discussing the specific problems I have with these interpretations it is important to clarify the role of the Commission under the statute.

The duty of the Commission is to approve or disapprove collective ratemaking agreements submitted by the car-

riers. Antitrust immunity automatically follows by statute once approval is given, if the carriers adhere to the specific terms of their agreements. If they do not, they are automatically operating without immunity, subject to the operation of the antitrust laws. The carriers do not continue to be immunized while engaging in activities which are contrary to the terms of their agreement. It is not necessary for the Commission to first revoke their existing agreement in order for the carriers to become liable for antitrust violations.

The interim solution promulgated by this decision states that under Section 14(e), violations of these interim standards and interpretations are grounds for immediate consideration of withdrawal of immunity. This statement is erroneous. The Commission has not been vested by Section 14(e) with the power to withdraw interim immunity. What the statute does provide is continued immunity under previously approved agreements during the period in which new or amended agreements are being finally disposed of by the Commission. This interim immunity is conditioned upon compliance by the ratemaking organization with the statutory section including amendments made by this section and regulations issued under such amendments. If the conditions are not met, then the carriers have no interim immunity and operate subject to the antitrust laws until a final decision is made by the Commission on their new agreements. This interpretation of the statute applies equally to the other references to termination for specific causes which are contained in the decision.

A potentially more serious problem of exceeding the Congressional mandate arises from the interpretation of available remedies. The provision for suspension or investigation of rates on the basis of allegations of "improper activity" in my view goes beyond the Congressional intent. As in the prior statute the Commission's power in the rate bureau area is limited to approval or disapproval of agreements. It is the clear Congressional

intent that the Commission "stay within the powers specifically vested in it by the revised laws". As I have already stated, the Congress intended to limit our discretion not increase it. To my knowledge, the Commission has never suspended a rate on the grounds that a carrier violated its rate bureau agreement. The proper remedy appears to be under the antitrust laws to which the carrier would be automatically subject by engaging in unapproved activities. In fact the statute increases the efficacy of available remedies under the antitrust laws by providing for public scrutiny of rate bureaus, which argues against the necessity for excessive involvement by the Commission in the enforcement end of collective ratemaking.

VICE CHAIRMAN GRESHAM, dissenting in part:

If I were the author of this notice, I would have included the following quote from the House Report (H.R. Rep. No. 96-1069, 96th Cong., 2nd Sess., p. 29 (1980).) in the notice:

> In other parts of the rate bureau section of the bill, the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the section, there is a presumption that the Commission should find the agreement to be in the public interest.

In my opinion, we must follow the Congressional direction explicated in this passage which is similar to language found at page 31 of the Senate Report (S. Rep.

No. 96-641, 96th Cong., 2nd Sess. (1980).) It is in this spirit that I issue this dissent.

Apart from the general tone of the notice, I agree with the rules or standards proposed by the majority with two exceptions. First, while I strongly endorse the proposal to prohibit rate Bureaus from requiring independent actors to docket their proposals, I would not at this time dictate to an independently acting carrier that it may not docket a proposal or that it may do so only at a prescribed time, except for those proposals which are singled out for different treatment under 49 U.S.C. 10706(b)(3)(C).

The Motor Carrier Act of 1980, which we here are proposing to implement, explicitly permits rate bureaus to discuss single line rates, with the previously noted exceptions, until 1984. Congress chose to allow this until 1984 and I am unwilling to undo that which Congress has mandated. Furthermore, I believe we do not have the authority to do so.

Second, I am not in favor of adopting the requirements that sound recordings be kept and that copies of these recordings and typed transcripts be made available for purchase upon request. Congress has added 49 U.S.C. (b)(3)(B)(v), which imposes "sunshine" requirements which I believe are adequate yet reasonable. Thus, I do not support the majority's proposal to supplement those requirements.

COMMISSIONER STAFFORD, dissenting:

Today's decision fails to give any consideration or credence to the principal concern of Congress that the rate bureau as an institution be retained without major changes until Congress has received the report and recommendations of the Motor Carrier Ratemaking Study Commission. The rush to make changes herein, proposed administrative actions which presage renewed investigations of rate bureaus, threats to remove antitrust immunity, and separate actions or potential actions in other

areas of ratemaking can lead but to one conclusion, this is a determined administrative effort to dismantle the rate bureaus as speedily as possible. Obviously, Congress did not establish the elaborate provisions regarding the Study Commission unless it expected that organization to do more than to rubber stamp interim actions of this Commission.

Turning next to specific aspects of the decision, the following areas raise serious legal and administrative problems.

1. *Sample forms.* The decision seeks to establish uniform provisions to be used by all rate bureaus. While uniformity is desirable in some circumstances, the situation at hand is not one of them. The establishment of rates and related matters are the prerogatives of the carriers, not the Commission, and I would defer to the distinctive needs of groups of carriers in a rate bureau [1] *providing* that the agreements are in conformity with the Act.

2. *Docketing.* When is a "docketing" a "docketing"? The interpretation of what constitutes docketing of a proposal, whether by independent action or otherwise, should be simply left open for comment. Without question, the interpretations offered in various sections of today's decision are complex, unclear, and will lead to disputes. Clearly, this agency should not attempt to act as a rate bureau, as is evident from the regulations applying to independent actions.

3. *Penalties.* The decision proposes to reject a rate tariff automatically if there are significant violations of an agreement. This is a drastic action and appears to be

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[1] Cf., for example, the rate bureaus established by household goods carriers. The latter are a distinctive group of carriers, have a separate uniform system of accounts (49 CFR Part 1207, table III, et seq.), prepare a separate annual report (Form M-H), and are presently being given separate consideration by Congress in pending legislation. See, S. 1798, Household Goods Transportation Act of 1979, Section 4, in connection with antitrust immunity.

beyond the powers allotted to the Commission. In any event, rejection of a tariff should be automatically stayed pending an appeal.

In summary, I am concerned lest this and related decisions or actions lead inevitably to the dismanting of the rate bureaus even before the Study Commission, an expert independent body, has reviewed the matter and has made its recommendations to Congress.

SUPREME COURT OF THE UNITED STATES

No. 82-1643

INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed June 20, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

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Supreme Court, U.S.
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MAY 31 1983
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CLERK

No. 82-1643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Interstate Commerce Commission may retroactively invalidate tariff rates that have become effective in accordance with the Interstate Commerce Act's provisions for establishing rates, but which are subsequently found to have been established in violation of an approved motor carrier rate bureau agreement.

PARTIES TO THE PROCEEDING

The following were original petitioners below and are respondents here: American Trucking Associations, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association, Inc.; New England Tariff Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference. The following were intervenors in support of the original petitioners below: Alaska Carriers Association, Inc.; Bulk Carrier Conference, Inc.; Drug & Toilet Preparation Traffic Conference, Inc.; Heavy & Specialized Carriers Tariff Bureau; Household Goods Carriers' Bureau, Inc.; Motor Carriers Traffic Association, Inc.; National Association of Specialized Carriers, Inc.; National Small Shipments Traffic Conference, Inc.; Ohio Motor Freight Tariff Committee, Inc.; and Steel Carriers' Tariff Association, Inc. The affiliates of respondent American Trucking Associations, Inc. are named in an attachment hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1643

INTERSTATE COMMERCE COMMISSION, *et al.*,
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AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (Pet. App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In the proceeding under review below, Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, the Interstate Commerce Commission promulgated a number of rules which purport to interpret and implement certain provisions of Section 14 of the Motor Carrier Act of 1980 governing the operations of rate bureaus. Respondents include the major motor carrier rate bureaus. These rate bureaus perform their functions under procedures set forth in agreements which are filed with the ICC and which, if they comply with the requirements and restrictions in Section 10706(b) of the Interstate Commerce Act, are required to be approved by the ICC. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

A typical agreement provides that any person may submit for collective action by the carriers, a proposal to establish or change a rate or rates in the bureau's tariffs. Notice of proposals are regularly distributed to all carrier members of the bureau and to all members of the public who subscribe to the bureau's docket bulletin. All proposals that would effect significant changes in rates are referred to a committee of carrier members.[1] Following a public discussion among carriers, shippers, and any other persons wishing to participate, the committee either approves, disapproves, or modifies the proposal. Approved or modified proposals are published in the tariffs and filed with the ICC to become effective in accordance with the provisions of Section 10762 of the Interstate Commerce Act, 49 U.S.C. § 10762.

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[1] Proposals of a minor nature to which no carrier or shipper objects may be automatically published in the tariffs and filed with the ICC.

Section 10762 sets forth detailed procedures for establishing and changing rates. Subsection (a) requires every carrier to publish and file with the ICC tariffs showing all of the rates governing the transportation it performs. Subsection (b) authorizes the ICC to prescribe the "form and manner" in which tariffs are to be published and filed. Subsection (c) provides that when a carrier proposes to change a rate, it must publish and file a notice of the proposed change 30 days before the proposed effective date. Subsection (e) provides that "the Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section."

Under the rule at issue here, the ICC proposed to use its 49 U.S.C. § 10762(e) rejection power to retroactively reject effective tariffs filed by rate bureaus, where there was "proof of significant violations" of approved ratemaking agreements. The ICC proposed to suspend and investigate the rates where there were "[a]llegations of lesser violations" (Pet. App. 66a). The Court struck down the proposed rule. It held that the ICC may not enforce the rate bureau provisions of the Act by rejecting or suspending tariffs "after the tariffs become effective" (Pet. App. 26a). Construing 49 U.S.C. § 10762(e), the Court noted that "the plain meaning of rejection is to refuse to receive" and that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date, . . . [and] an investigation is the only mechanism available for challenging *effective* tariffs' " (Pet. App. 28a, emphasis in original). The Court further noted that "there are compelling reasons to re-

strict rejection to the period before a rate becomes effective" (Pet. App. 28a). It stated:

> Because a carrier may charge only the rates on file, and because rejection has the effect of declaring a rate void *ab initio* as if never filed, rejection necessarily carries with it a right to refund for overcharges (in the case of rate increases), measured always by the preexisting rate. This undermines the uniformity and reliability interests that the system of tariff filing was meant to foster (Pet. App. 28a, footnote omitted).

"Review of the statute, the major decisions, and policy," the Court said, "leads us to conclude that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking" (Pet. App. 29a).

DISCUSSION

Petitioners argue that the ICC has the authority to retroactively reject tariffs that have become effective in accordance with the Act's provisions for establishing rates, but which are subsequently found to have been established in violation of an approved ratemaking agreement. We believe that the Court of Appeals correctly rejected this argument. We agree with petitioners, however, that the decision below conflicts with that of the Court of Appeals for the Fifth Circuit in *Aberdeen & Rockfish R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982).

Under review in *Aberdeen* was the ICC's decision in Ex Parte No. 370, *Tariff Improvement*. There the ICC adopted a rule which would retroactively invalidate tariff increases that have become effective in accordance with the Act's provisions for establishing rates, but which are

subsequently found to have been established in violation of the ICC's tariff symbolization rules. The symbolization rules require tariff changes to be flagged by designated symbols to denote increases, reductions, or changes which result in neither increases nor reductions in charges. The Court sustained the ICC's rule invalidating missymbolized tariff increases. In so doing, it specifically rejected the argument that the ICC has no authority to retroactively invalidate a tariff after it has become effective. Thus, the conflict between the decision of the Eleventh Circuit below and the decision of the Fifth Circuit in *Aberdeen* is direct and irreconcilable.

One of the respondents here, National Motor Freight Traffic Association, Inc., and a group of railroads filed petitions for a writ of certiorari in the *Aberdeen* case, *National Motor Freight Traffic Association* v. *United States* and *Aberdeen & Rockfish R.R.* v. *United States*, Nos. 82-804 and 82-707. In their response to those petitions, the United States and the ICC noted the conflict between the decision below and the *Aberdeen* decision, and stated that they do not oppose the grant of the petitions. They suggested that it would be appropriate for the Court to defer consideration of those petitions until their petition in this case was filed so that the cases may be considered together.

We agree that a resolution of the issue presented in these conflicting decisions is of great practical importance. This Court has previously held that an effective tariff may not be disregarded or treated as nonexistent simply because of some tariff filing irregularity, thereby rendering the carriers strictly liable for refunds measured by the preexisting rates without regard to whether the shippers suffered any actual harm. *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Min-*

ing Co. v. *Chicago & E. R.R.*, 235 U.S. 371 (1914). Yet, that is precisely the result that would be reached under the ICC's interpretation of its tariff rejection authority.

Such a result would have a devastating impact on the carriers. As NMFTA showed in its petition in *Aberdeen*, a single tariff change filed by a rate bureau may apply to shipments handled by more than 3,000 carriers. Rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day. Moreover, shippers would be encouraged to wait until the applicable three year statute of limitations has nearly run before instituting suits for overcharges. By waiting until the last minute, the shippers would save themselves nearly three years of increases, since they would be entitled to a refund of all charges in excess of those provided in the original tariff sought to be increased.

While we believe that the decision below properly precludes such a result, we agree that the present situation in which such a result is possible in some circuits but not in others is intolerable. Accordingly, we do not oppose the grant of the petition for certiorari here, provided that the petitions are also granted in *Aberdeen*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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May 1983

ATTACHMENT

ATTACHMENT

Affiliates Of American Trucking Associations

American Movers Conference

Common Carrier Conference-Irregular Route

Contract Carrier Conference

Film, Air, & Package Carriers Conference

Munitions Carrier Conference

National Automobile Transporters Association

National Tank Truck Carriers, Inc.

Oilfield Haulers Association

Private Carrier Conference

Regional & Distribution Carriers Conference

Regular Common Carrier Conference

Specialized Carriers & Rigging Association

Steel Carriers Conference

Alabama Trucking Association

Alaska Trucking Association, Inc.

Arizona Motor Transport Association

Arkansas Bus & Truck Association, Inc.

California Trucking Association

Colorado Motor Carriers Association

Motor Transport Association of Connecticut, Inc.

Delaware Motor Transport Association

Washington D.C. Area Trucking Association

Florida Trucking Association, Inc.

Georgia Motor Trucking Association, Inc.

Hawaii Transportation Association, Inc.
Idaho Motor Transport Association
Illinois Trucking Associations, Inc.
Indiana Motor Truck Association, Inc.
Iowa Motor Truck Association, Inc.
Kansas Motor Carriers Association
Kentucky Motor Transport Association, Inc.
Louisiana Motor Transport Association, Inc.
Maine Motor Transport Association, Inc.
Maryland Motor Truck Association, Inc.
Massachusetts Motor Truck Association, Inc.
Michigan Trucking Association, Inc.
Minnesota Motor Transport Association
Mississippi Trucking Association
Missouri Bus & Truck Association
Montana Motor Carriers Association, Inc.
Nebraska Motor Carriers Association, Inc.
Nevada Motor Transport Association, Inc.
New Hampshire Motor Transport Association
New Jersey Motor Truck Association
New Mexico Motor Carriers' Association, Inc.
New York State Motor Truck Association
North Carolina Motor Carriers Association, Inc.
North Dakota Motor Carriers Association, Inc.
Ohio Trucking Association
Associated Motor Carriers of Oklahoma, Inc.

Oregon Trucking Association, Inc.

Pennsylvania Motor Truck Association

Rhode Island Truck Owners Association, Inc.

Motor Transportation Association of South Carolina, Inc.

South Dakota Trucking Association

Tennessee Motor Transport Association

Texas Motor Transportation Association

Utah Motor Transport Association

Vermont Truck & Bus Association, Inc.

Virginia Highway Users Association, Inc.

Washington Trucking Associations, Inc.

West Virginia Motor Truck Association

Wisconsin Motor Carriers Association

Wyoming Trucking Association, Inc.

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No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority, in cases where a tariff is filed and becomes effective but is thereafter found to have violated an approved motor carrier rate bureau agreement, to invalidate the filing upon discovery of the violation and thereby render the unlawful tariff void ab initio.

PARTIES TO THE PROCEEDING

The United States was a respondent below and is a petitioner here. Respondents here include, in addition to the American Trucking Associations, Inc., the following original petitioners below: Central State Motor Freight Bureau; Central and Southern Motor Freight Tariff Association Inc.; Eastern Central Motor Carriers Association; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association Inc.; New England Motor Rate Bureau Inc.; Niagra Frontier Tariff Bureau Inc.; Pacific Inland Tariff Bureau; Rocky Mountain Motor Tariff Bureau Inc.; and Southern Motor Carriers Rate Conference. Respondents here also include the following intervenors below: The National Small Shipments Traffic Conference, Inc.; the Drug and Toilet Preparation Traffic Conference, Inc.; the National Association of Specialized Carriers, Inc.; Ohio Motor Freight Tariff Committee Inc.; Household Goods Carriers Bureau Inc.; Steel Carriers Tariff Association Inc.; Heavy & Specialized Carriers Traffic Bureau; Alaska Carriers Association Inc.; Bulk Carriers Conference Inc.; and Motor Carriers Traffic Association, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (J.A. 4-16; Pet. App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092 and 364 I.C.C. 921.

JURISDICTION

The judgment of the court of appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983, and was granted

on June 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, 49 U.S.C. (Supp. V) 10706, 10762, 11701, and 11705 are set forth at Pet. App. 96a-100a.

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. V) 1 *et seq.*,[1] carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. A tariff filed with the Commission generally becomes effective only after a waiting period.[2] During the waiting period, the Commission entertains any protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. 10762(e), 10707, 10708. Once a tariff is in effect, carriers must charge and shippers must pay the rates named in the tariff. 49 U.S.C. 10761.

Until 1979, the Commission examined every filing for obvious defects prior to the tariff's effective date. Tariffs containing serious errors were rejected, and the carrier was required to refile an acceptable tariff.

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[1] Hereafter, references to 49 U.S.C. will be to the current statute, printed in Supp. V, unless otherwise indicated.

[2] The waiting period for railroad rates is 20 days (10 days for reductions). 49 U.S.C. 10762(c)(3). Motor carrier rates become effective after 30 days. 49 U.S.C. 10762(a)(2). The Commission has the power to shorten the waiting period. 49 U.S.C. 10762(d)(1).

When an insubstantial error was discovered, the Commission either required prompt correction, or advised the carrier of the error and requested that it take more care in the future. Because this preexamination procedure minimized the possibility that a tariff containing errors would become effective, the Commission generally imposed no penalty on those rare occasions when an error was discovered after a tariff had gone into effect.

When budget reductions forced the Commission to reallocate its scarce resources, the Commission determined that it could no longer maintain sufficient tariff examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] As a practical matter, therefore, unless a defect is called to the Commission's attention by an interested party, virtually all tariffs filed with the Commission automatically go into effect.

2. Since 1948, motor carriers subject to regulation by the Commission have been authorized by the Reed-Bulwinkle Act (ch. 491, 62 Stat. 472, now codified at 49 U.S.C. 10706(b)) to enter into rate agreements with other carriers.[4] The carriers have established rate bureaus to facilitate the negotiation of collective rates. The rate bureaus act as their members' agents in submitting to the Commission tariffs containing the collective rates, and also tariffs containing rates established by their individual members. Although in

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[3] Currently, the Commission examines only the title pages of tariff filings.

[4] Although the Reed-Bulwinkle Act also applies to rail carriers (49 U.S.C. 10706(a)), this case involves only motor carriers and shippers.

collective ratemaking carrier members of the bureau meet and determine the rates to be submitted to the Commission, "creating essentially a forum for cartelization" (Pet. App. 2a), the carriers' activities in a rate bureau do not violate the antitrust laws, so long as the agreement establishing the bureau has been approved by the Commission, and the carriers' actions conform to the agreement. 49 U.S.C. 10706(b). See *Motor Carriers Traffic Association* v. *United States*, 559 F.2d 1251, 1253-1254 (4th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

Until Congress enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, 49 U.S.C. 10101 *et seq.*, the Commission had broad discretion to define the conditions under which it would approve rate bureau agreements. See Pet. App. 2a; 49 U.S.C. (1976 ed.) 5b(2); H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947). In Section 14 of the Motor Carrier Act of 1980 (94 Stat. 803), however, Congress enacted specific statutory restrictions with respect to rate bureaus and rate bureau agreements. Motor carrier rate bureaus must comply with these statutory restrictions if they wish to maintain their antitrust immunity. Among other things, the statute requires disclosure of membership (49 U.S.C. 10706(b)(3)(A)); imposes limits on discussions of and actions on proposed rates (49 U.S.C. 10706(b)(3)(B)); guarantees the rights of bureau members to act independently (*ibid.*); and requires timely action on proposed rates (49 U.S.C. 10706(b)(3)(B)(vii)). More specifically, the Act restricts voting on collective proposals to those carriers that have authority to participate in the transportation to which the proposal applies; bars bureau protests of any motor carrier rate proposed by an individual carrier; limits dis-

cussion of general rate increases to industry average costs; imposes strict limits on bureau handling of independent action proposals; requires completely open bureau meetings; and bars any discussion of, or voting on, single-line rates[6] after January 1984. 49 U.S.C. 10706(b)(3)(D).[6]

In considering the 1980 Act, Congress explained that one of its primary aims was to develop "a legislative solution aimed at increasing competition" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3 (1980)).[7] The activities of rate bureaus constitute an extraordinary exception to the usual rules condemning absolutely collusive activities to set prices; the specific purpose of Section 14 was to limit severely the permissible scope of such collusive ratemaking by these bureaus (H.R. Rep. No. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. No. 96-641, 96th Cong., 2d Sess. 13-14 (1980)).[8]

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[6] Single line rates are those offered by a carrier over its own lines, not involving the services of other carriers.

[6] Section 14(a) also requires the bureaus to submit new agreements incorporating the statute's restrictions to the Commission for approval (49 U.S.C. 10706(c)).

[7] The Senate Report notes (S. Rep. No. 96-641, 96th Cong., 2d Sess. 14 (1980)): "evidence in the record does not support the contention * * * that trucking transportation is so different from all other forms of economic activity in the country that it, and it alone, should be allowed to exercise this extraordinary immunity from antitrust laws"—*i.e.*, the right to discuss and vote on single line rates.

[8] In addition, Congress established an independent study commission to consider "the need, if any, for continued antitrust immunity" for collective ratemaking (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 4 (1980)). See also 49 U.S.C. 10706(i)(1) (Federal Trade Commission and Antitrust Division of Department of Justice to issue publicly available periodic reports to Commission on possible anticompetitive

3. The Commission implemented Section 14 with the rules adopted in *Motor Carrier Rate Bureaus-Implementation of P.L. 96-296*, Ex Parte No. 297 (Sub-No. 5) (ICC Dec. 19, 1980) (Pet. App. 32a-72a).[9] Although Ex Parte No. 297 implements and interprets the full range of the provisions in Section 14 of the Motor Carrier Act of 1980, this case, at this stage, involves only the Commission's decision (Pet. App. 66a-68a) that tariff rejection is an appropriate remedy for proven violations of rate bureau agreements. The Commission noted (Pet. App. 66a) that in an interim decision of August 1980 (J.A. 9), it had "expressed concern for the lack of definite remedies for proven rate bureau violations [and] * * * anticipated a need for immediate administrative remedies to assure the integrity and consistency of our regulation. [Accordingly, the Commission had] proposed to adopt a standard providing that proof of significant violations of an approved agreement will result in tariff rejection". After considering the comments received, the Commission concluded that it would exercise its authority under 49 U.S.C. 10762(e)[10] to

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features of rate bureau operations and agreements, and ways to alleviate or correct these features).

[9] Instead of proposing regulations in codified form for inclusion in the Code of Federal Regulations, the Commission published in Ex Parte No. 297 "a narrative description of the conditions and restrictions that must be contained in rate bureau agreements in order to obtain ICC approval" (Pet. App. 2a-3a).

[10] That section provides:

> The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

reject tariffs even after they have gone into effect, in cases where there is a "significant" and "clear" violation of an approved agreement (Pet. App. 66a, 68a).[11] The Commission explained (Pet. App. 67a):

> Pursuant to 49 U.S.C. 10762(e), the Commission is expressly authorized to reject tariffs published in violation of the act or our regulations. See *Acme Fast Freight, Inc. Common Carrier Application* [17 M.C.C. 549 (1939), affirmed sub nom. *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (1940), affirmed, 309 U.S. 638 (1940)]. The courts have concluded that regulatory agencies possess inherent authority to reject tariff matter and have construed that authority to extend beyond technical requirements of form and order. *Municipal Light Bds.* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

A tariff rejected after its effective date is considered void ab initio. Accordingly, because the carrier has collected charges that exceed the applicable rate contained in a properly filed tariff, the carrier is

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[11] Where a lesser violation of an agreement is shown prior to a tariff's effective date, the tariff will be suspended and/or investigated (J.A. 9; Pet. App. 78a). After the tariff becomes effective, if the violation is not serious enough to merit rejection, the Commission could require the correction of the violation, and either cancel the tariff until that is done (establishing a reasonable rate for the interim), or permit the tariff to remain in effect until the correction is made. The Commission also noted (Pet. App. 68a) that it would continue to refer to the antitrust authorities the results of Commission investigations into alleged violations of bureau agreements, and would continue its practice of withdrawing approval of agreements of bureaus that failed to adhere to approved procedures. The suspension remedy and the remedies of investigation, referral or withdrawal are not at issue here.

liable to refund, as overcharges, all amounts collected in excess of the rates named in the last lawfully filed tariff. See 49 U.S.C. 11705(b)(1).[12] Overcharge liability attaches without regard to whether the rates named in the rejected tariff are otherwise reasonable and nondiscriminatory, and without regard to whether shippers were actually damaged by paying the higher rates.[13] The Commission explained (Pet. App. 68a):

> [T]he only permissible activity which enjoys immunity from the antitrust laws is that carried out under the detailed procedure in the agreement and bylaws. We intend to enforce vigorously compliance with these procedures so that the public may enjoy the benefits Congress anticipated when it enacted the rate bureau provisions of Public Law 96-296.

The Commission also made clear (Pet. App. 82a, 90a) that before a tariff is rejected, the rate bureau involved will have an opportunity to be heard and a right to appeal. In sum, the Commission stated, the rejection remedy will not prevent the bureaus "from establishing lawful rates but only rates formulated in violation of the antitrust laws" (Pet. App. 82a).

4. The major motor carrier rate bureaus[14] filed a petition in the court of appeals to review the Com-

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[12] Section 11705(b)(1) provides: "A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title."

[13] Shippers who have been so damaged may seek relief under 49 U.S.C. 11705(b)(2) (for rail and water carriers) or 11705(b)(3) (motor carriers and freight forwarders).

[14] These rate bureaus are identified at page II, *supra*.

mission's interpretation and implementation of Section 14 of the Motor Carrier Act of 1980, as permitted by 28 U.S.C. 2344 (see also 28 U.S.C. 2321, 2341). Several groups representing shippers intervened as petitioners (Pet. App. 1a n.1; p. II, *supra*)).[15] Petitioners in the court of appeals challenged Commission rules pertaining to advance notice of independent action by individual carriers; cancellation of outstanding special permission authorities waiving statutory tariff filing procedures; limitations on discussion of general rate increases; authorization of sound recordings at open bureau meetings; and the interpretation of the statute's restrictions on discussion of rates that limit liability (Pet. App. 10a-24a). They also challenged the Commission's decision to reject tariffs that involve significant violations of rate bureau agreements, contending, *inter alia*, that the power to reject expires when a tariff becomes effective.

5. The court of appeals upheld virtually all of the Commission's proposals in Ex Parte No. 297,[16] with one significant exception: it held that the Commission has no power to reject tariffs once they have become effective. The court confirmed the Commission's power to reject tariffs that violate rate bureau agreements, so long as the rejection occurs *before* the tariffs become effective (Pet. App. 24a-26a); but it

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[15] The petition originally sought review of the interim Commission decision of August 1980 (J.A. 9). While the petition for review was pending, the Commission entered its final decision, and the court of appeals accordingly limited its review to that decision (Pet. App. 3a n.3).

[16] The court invalidated the portion of the rules dealing with blanket special permission authority, on the ground that the Commission had failed to provide adequate opportunity for notice and comment (Pet. App. 16a).

held that when an *effective* tariff is found to be unlawful, the Commission's powers under the Act extend only to determining what is the proper rate, and awarding actual damages. The court read the statutory authority to reject tariffs (49 U.S.C. 10762(e)), like the suspension authority in 49 U.S.C. 10708, as limited to *proposed* tariffs; it found no such authority with regard to tariffs that have become effective, and concluded that its prior decisions and those of this Court were inconsistent with the assertion of that authority (Pet. App. 28a). Moreover, the court of appeals asserted that requiring the carrier to refund, as an overcharge, the difference between the rate paid under an effective tariff and the former tariff "undermines the uniformity and reliability interests that the system of tariff filings was meant to foster" (Pet. App. 28a). Finally, the court distinguished the "two lines of cases" that it recognized "shed doubt" on its conclusion (Pet. App. 29a).

SUMMARY OF ARGUMENT

The question presented in this case is whether, in cases where a motor carrier rate seriously violates an approved rate bureau agreement, and that rate is filed with the ICC, the ICC loses the power to reject the rate as unlawful ab initio (and thus to create a basis for overcharge liability) solely because the violation was not immediately discovered and the rate has gone into effect.

The court of appeals held that the Commission wholly lacks power ever to reject a rate after it has gone into effect, notwithstanding that the rate may be in egregious violation of the stringent limitations that Congress in 1980 imposed on the right of motor carriers to enter into collusive pricing arrangements

through the activities of rate bureaus. In so holding, that court imposed a rigid limitation on the discretion of the Commission to create a remedial regime adapted to serve the policies of the Act—a limitation not justified by the statutory language, by the relevant case law, or by the policies of the Act. Accordingly, that court's decision should be reversed.

1. Section 10762(e) of the Interstate Commerce Act authorizes the Commission to reject any tariff if that tariff violates the Act or regulations of the Commission issued thereunder. (Correspondingly, Section 11705(b)(1) provides that shippers may recover overcharges.) The statutory language—in explicit contrast to that governing the Commission's power to *suspend* tariffs—is in no way limited to *proposed* tariffs and does not impose time constraints on the use of the rejection remedy. The Commission, in line with the natural thrust of the statutory language, has long asserted that it may reject rates even after they have gone into effect if doing so will serve important regulatory purposes; its entirely reasonable construction of its own governing statute should have been sustained.

2. Even if the statutory language were more ambiguous than it in fact is, the Commission's interpretation of its rejection authority should be upheld as reasonably ancillary to its statutory mission. It is wholly unrealistic to think that all (or even most) filings can be fully investigated immediately to make sure that they are not violative of relevant rate bureau agreements. The court of appeals' decision in effect confers on carriers the right to retain the fruits of those violations as long as they can get the relevant tariff into effect. And it does so notwithstanding Congress' carefully designed plan severely to limit

the area within which carriers are free to engage in cartel pricing free of the constraints of the antitrust laws.

In contrast, the Commission's rejection plan is a focused and effective remedial scheme, designed to assure that in cases of—and only in cases of—serious violation, carriers will not be permitted to retain the benefits of charges which all agree to have been imposed without lawful authority.

3. The relevant case law strongly supports the Commission's authority to reject tariffs even after they have become effective. This Court has upheld such authority in connection with the Natural Gas Act, see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); and thoughtful lower-court opinions have done so under the Interstate Commerce Act provisions in dispute here. See, *e.g.*, *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957) and *Aberdeen & Rockfish R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982), petition for cert. pending, No. 82-707. The cases relied on by the court of appeals, on the other hand, do not support its judgment.

4. The court of appeals' argument that the invalidation of tariffs once they have gone into effect would disturb the Act's policies of tariff uniformity and reliability is without support in the Interstate Commerce Act or the decisions of this Court. The emphasis of the lower court on the importance of rate uniformity is inconsistent with the most recent expression of congressional policy; Congress made it crystal clear in 1980 that it was interested in price competition much more than price uniformity. In any event, the rejection of effective tariffs after the full hearing contemplated by the Commission would not

undermine that uniformity any more than does the complaint procedure which permits a shipper to challenge motor carrier rates at *any* time under 49 U.S.C. 11701, and to recover damages if those rates are found to be unlawful. Thus, carriers can never be certain that their rates will not be found unlawful or that they will not have to make refunds to shippers. In fact, carriers who commit serious violations of rate bureau agreements should not be allowed to justify those violations in reliance on any such certainty. It was thus a wholly appropriate exercise of discretion for the Commission, after careful consideration, to conclude that invalidating ab initio tariffs that reflect clear violations of rate bureau agreements would be the most effective way to ensure compliance with these agreements.

ARGUMENT

THE COMMISSION HAS AUTHORITY TO REJECT TARIFFS THAT ARE UNLAWFUL BECAUSE THEY SERIOUSLY VIOLATE RATE BUREAU AGREEMENTS WHETHER OR NOT THE TARIFF HAS GONE INTO EFFECT

It is undisputed that the collective formulation of a motor carrier rate contrary to an approved rate bureau agreement violates the Interstate Commerce Act (as well as the antitrust laws) and warrants remedial action by the Commission (Pet. App. 24a-25a). See also *Board of Trade* v. *ICC*, 646 F.2d 1187, 1192 (7th Cir. 1981) (ICC *must* find tariffs formulated in violation of rate bureau agreement unlawful). It is also undisputed that the remedies available to the Commission include disapproval of the rate bureau's agreement (which terminates the antitrust immunity conferred by 49 U.S.C. 10706(b)(2)), rejection or suspension of unlawfully formu-

lated tariffs *before* they become effective, and prospective cancellation of tariffs (with attendant liability for any proven damages) if the violations are discovered after the tariffs have gone into effect (Pet. App. 24a-25a, 27a-28a). Thus, the only issue before this Court in this case is whether the Commission's power to reject and thereby render a tariff void ab initio is confined to the preeffective period.

The court of appeals held that rejection of a tariff after it has become effective is beyond the Commission's statutory power. But the Act's authorization to the Commission to reject tariffs that violate the Act or any regulation issued thereunder does not depend on when the defect is discovered. Nor is there any provision of the Interstate Commerce Act or decision of this Court that restricts the Commission's power to select an appropriate remedy for violations of the Act's provisions narrowly confining the right to engage in collusive pricing. To the contrary, this Court has established that administrative agencies have a duty to exercise their discretion to choose remedies that will best advance the purposes of the statutes they administer. Because the Commission's choice of the rejection remedy for rate bureau agreement violations is entirely consistent with this controlling principle, and because the remedy is not foreclosed by the Act, the Court should affirm the agency's power to reject tariffs after they have become effective.

A. The Interstate Commerce Act Does Not Limit Tariff Rejection To The Period Before The Tariff Goes Into Effect

Section 10762(e) provides that:

> [t]he Commission may reject a tariff submitted to it by a common carrier under this section if

> that tariff violates this section or regulation of the Commission carrying out this section.

This language contains no time constraints and is in no way limited to proposed or ineffective tariffs. Thus, taken at face value, the statute empowers the Commission to reject any tariff violating the Act.[17]

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[17] The statute refers to violations of "this section." Section 10762 sets forth requirements with respect to filing and publication of tariffs. It is nevertheless established that the Commission may reject tariffs for substantive, as well as formal procedural violations of the Act. The court of appeals explained (Pet. App. 25a-26a, footnote omitted):

> "Although filing defects are the primary focus of the rejection power, *see* 49 U.S.C. § 10762(e); *Southern Motor Carriers Rate Conference* v. *U.S.*, 676 F.2d 1374, 1376 (11th Cir. 1982) (discussing rejection for publication errors), courts have frequently held that the power is not strictly limited to these defects. The seminal case is *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972), whose reasoning we adopt here:
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> > [Rejection] is a peremptory form of response to filed tariffs * * *. Its use is not limited to defects of form. It may be used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket . . . . [A] rate filing may be rejected both when the governing statute explicitly provides for rejection and when it does not. The Commission ha[s] authority to issue a regulation . . . for the rejection of filings that patently fail to establish substantial compliance with [the Act and] duly issued regulations. This rests on its basic statutory authority to issue regulations . . . to carry out the provisions of the Act.
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> *Accord, United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347, 76 S.Ct. 373, 382, 100 L.Ed. 373

See *Aberdeen & Rockfish R.R.* v. *United States, supra,* 682 F.2d at 1097-1099.[18] Indeed, until the Interstate Commerce Act was recodified in 1978,[19] the forerunner of Section 10762(e) (49 U.S.C. (1976 ed.) 217(a)) provided:

> * * * the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(1956) ("There can be no doubt of the authority of the Commission to reject [an] unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act.' "); *North Central Truck Lines, Inc.* v. *ICC,* 559 F.2d 802, 804-05 (D.C. Cir. 1977); *Delta Airlines, Inc.* v. *CAB,* 543 F.2d 247, 264 (D.C. Cir. 1976); *W.J. Dillner Transfer Co.* v. *U.S.,* 214 F.Supp. 941, 946 (W.D.Pa. 1963)."

[18] The *Aberdeen* court correctly rejected (682 F.2d at 1097) the "imaginative, but sophistic," argument that, since Section 10762 governs the publishing and filing of *proposed* tariffs, the authority to reject a tariff submitted "under this section" should be limited to proposed tariffs:

> Section 10762 does not confine itself to proposed tariffs; it prescribes general rules for the filing of tariffs, and they obviously must remain on file after going into effect * * *. Moreover, since section 10762 is the source of all tariff publication and filing requirements, any tariff, proposed or effective, must have been submitted to the Commission "under this section".

[19] This recodification was not intended to enact any substantive changes in the prior statute. H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 9 (1978); *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 319 n.7 (1981); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222, 227 (1957).

Because a tariff obviously cannot be "used" before it is effective, the fact that the statute barred all "use" of unlawfully established tariffs indicates that Congress anticipated that some tariffs would be in effect when rejected by the ICC. And the tariff suspension provisions of the Act (49 U.S.C. 10708)—which are expressly limited to "proposed" tariffs—show that where Congress wished to limit the Commission's power to act to the time before a tariff becomes effective, it expressed itself explicitly to that end.[20]

The Commission has long assumed the authority to reject effective rates that do not comply with the Act or Commission regulations, thereby allowing shippers to claim overcharges from the time of the asserted effective date. See, *e.g.*, *Mercer Valley Ry.* v. *Pennsylvania Ry.*, 69 I.C.C. 233, 234 (1922) (tariffs filed by a non-common carrier of no force and effect); *Acme Fast Freight Inc., Common Carrier Application*, 17 M.C.C. 549, 556-557 (1939), sustained, 30 F. Supp. 968 (S.D.N.Y.), aff'd, 309 U.S. 638 (1940) (tariffs filed by freight forwarders, not common carriers, stricken from ICC files); *Bell Potato Chip Co.* v. *Aberdeen*, 43 M.C.C. 337, 343 (1944) (duty of carrier to refund overcharges where rates charged for past shipments found inapplicable because unlawful); *National Association of Specialized Carriers Inc., Agent-Show Cause and Strike Order*, ICC Order No. 36870 (Apr. 11, 1978) (tariff publication not submitted to certain tariff subscribers before its effective

[20] It should be noted that tariff suspension is summary and unreviewable (*Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)). In contrast, the rejection procedure contemplates a full hearing, and the Commission's action is subject to full judicial review. Cf. *Delta Airlines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976).

date declared null and void); *Conrail Surcharge on Pulpwood*, 362 I.C.C. 740, 755 (1980) (carrier required to refund all monies collected under schedules establishing unlawful rate surcharge).

As the Commission stated in rejecting rates that were published after less than the required statutory notice in *H.J. Baker & Bros.*, 357 I.C.C. 640, 644-645 (1978) (emphasis supplied):

> The tariffs on file, although unlawful, specified the applicable rate which the shippers were bound to pay, pursuant to the Act. The act requires strict observance of the tariff regardless of the inherent unlawfulness of the rates specified. However, when and if the rates are shown to be unlawful for any reason, shippers are entitled to recover the difference between what they paid under the applicable tariff and what is subsequently determined to be the lawful rate. * * * *Rates and charges unlawfully established whether in the method of filing or contrary to specific Commission orders are not due the carrier.*

The rejection rule in question in this case exactly reflects the broad power conferred by Section 10762 (e).[21] In contrast, the court of appeals ignored not only the plain language of the Act, but the established principle that an agency's reasonable construction of its governing statute should be sustained. *E.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 590 (1981); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16

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[21] And, of course, the fact that the statute expressly provides for other enforcement powers, such as investigation and a determination of unlawfulness pursuant to 49 U.S.C. 10704 (a)(1), does not suggest that Section 10762(e) should not be read broadly, in accord with its plain terms.

(1965); *United States* v. *American Trucking Associations*, 310 U.S. 534, 539 (1940).

It is true that the statute provides that shippers may recover their actual damages if it is determined that a filed and effective rate is unlawful. 49 U.S.C. 11705(b)(2) and (3). But it explicitly provides, in addition, for recovery of charges "exceed[ing] the applicable rate"—*i.e.*, overcharges in excess of a lawfully filed tariff.[22] The question of when the over-

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[22] Until the 1978 recodification of the Interstate Commerce Act, former Section 16(3)(g) (49 U.S.C. (1976 ed.) 16(3)(g)) defined overcharges subject to recoupment by the shipper as "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission." See *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products*, *supra*, 253 F.2d at 455-457 and *H. J. Baker & Bros.*, *supra*, 357 I.C.C. at 642-646 (tariff must be both "applicable" and "lawfully on file" in order to be fully collectible).

When the Interstate Commerce Act was recodified in 1978, Congress replaced Section 16(3)(g) with 49 U.S.C. 11705(b)(1), which allows the shipper to recover for "amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under [the Act's tariff filing requirements]."

In *Aberdeen & Rockfish*, *supra*, 682 F.2d at 1102-1103, the court of appeals correctly concluded that Congress, in eliminating the words "lawfully on file," could not have intended to restrict use of the overcharge remedy to cases where there is no applicable tariff on file. Stressing that the recodification intended no substantive change (see n. 19, *supra*), the court explained:

> * * * the revised wording still creates overcharge liability for charges that exceed the rate "contained in a tariff filed under [the Act]." Since a well accepted meaning of "under" as used in legal writings is "in accordance with", section 11705(b)(1) remains subject to the interpreta-

charge remedy should be available as an alternative to the damage remedy is appropriately a matter for the Commission's considered discretion in tailoring a remedial scheme to effectuate the policies of the Act. Here, it was the Commission's considered judgment that, in cases where there is a serious violation of a rate bureau agreement, the unlawful tariff should be voided ab initio and overcharges refunded to shippers. That judgment was carefully calibrated to further Congress' policy decision that the cartel activities of rate bureaus must be strictly confined. The Commission's conclusion, made in accordance with the terms of the Act, should, accordingly, be sustained.

B. Rejection Of Unlawful Tariffs That Have Become Effective Is A "Legitimate, Reasonable, And Direct" Adjunct To The Statutory Mandate That Carriers Must Comply Strictly With Approved Rate Bureau Agreements

This Court has established that the Commission's enforcement powers are not confined to those expressly spelled out in the Act. *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 654 (1978) (*"TAPS"*) (pursuant to the suspension power, the Commission properly ordered carriers to keep account of and refund amounts collected under interim rates); *United States* v. *Chesapeake & O. R.R.*, 426 U.S. 500 (1976) (Commission empowered to insist that the proceeds of a proposed general rail rate increase be used to pay for deferred maintenance); *Permian Basin Area*

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tion that a rate increase is not collectible unless it appears in a tariff filed in accordance with section 10762.

Thus, the statute allows the Commission to require the repayment of overcharges when it concludes either that a tariff is not applicable or that it is not lawful.

Rate Cases, 390 U.S. 747, 774-777 (1968). As the Court stated when affirming the Commission's exercise of the ancillary power to regulate motor carrier leasing practices, "[i]t is an unnatural construction of the Act which would require the Commission to sit idly by and wink at practices that lead to violation of its provisions." *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 311 (1953).

The touchstone of ancillary power is a "legitimate, reasonable, and direct" relationship between the power asserted and the statutory mandate. *TAPS*, *supra*, 436 U.S. at 654. When such a relationship exists, the Act should be construed to confer upon the Commission the necessary enforcement power, unless language in the statute plainly requires a contrary result. *Id.* at 655-656. Because there is a legitimate, direct, and reasonable relationship between the voiding of effective tariffs that seriously violate rate bureau agreements, and the statutory mandate that carriers adhere strictly to their approved collective ratemaking agreements as a condition for antitrust immunity, the Act should be construed to permit rejection of such tariffs.[23]

1. The Commission's rejection rule is a reasonable enforcement device. Even the court of appeals agreed that once a violation is discovered, carriers cannot

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[23] The change from pre-filing examination of all tariff filings to a system of spot checking (see p. 3, *supra*), has meant that a substantial number of rate bureau filings that would have been suspended under the old procedures for technical defects are now allowed to become effective. Thus, unless the Commission can reject effective tariffs, carriers in rate bureaus will obtain an unwarranted advantage over shippers simply because of the change in Commission procedures mandated by considerations of economy.

continue collecting rates named in unlawfully formulated but already effective tariffs (Pet. App. 22a, n.22, 27a). The court also held that the Commission can suspend or reject such tariffs before they become effective if the agency learns of the violation in time. These two undisputed holdings establish that carriers are not entitled to collect rates if those rates reflect rate bureau violations. The Commission's rule is the logical completion of this principle; it ensures that carriers will not benefit from tariffs that violate the commerce (and antitrust) laws in a significant manner, without regard to when the violation is discovered. Thus, the Commission's rule rejects the notion that carriers somehow acquire a right to collect and retain otherwise indisputably unlawful charges if they can just get the unlawful tariffs into effect.

As Congress emphasized in enacting the 1980 Act, a major function of Section 10706 was to increase competition among carriers by spelling out strict limits on the permissible scope of collective ratemaking (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 3-4, 10, 27-29 (1980); S. Rep. No. 96-641, 96th Cong., 2d Sess. 13-14 (1980)). That section reflects a careful balancing by Congress of the competing policies reflected in the antitrust laws and the Interstate Commerce Act. Congress concluded that the public interest justifies permitting certain exceptions to the antitrust laws; but it went to elaborate lengths to assure that those exceptions be limited to specifically described categories of action. Like all limitations on the national commitment to the policy of free markets and open competition, these exceptions should in any event be narrowly construed. See, *e.g.*, *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip. op. 5; *National Gerimedical Hospital*

v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). Accordingly, collective ratemaking should be carefully confined to situations where the carriers have complied scrupulously with the terms of Commission-approved agreements. Since compliance with those agreements is the keystone of the structure of the 1980 Act, an administrative sanction that will effectively assure such compliance is essential to effective implementation of the statute.

Rejection is just such a sanction. It is an immediate, narrowly focused, and effective remedy for rate bureau violations because it denies the carriers any benefit from collusive rates improperly arrived at. Rejection is particularly important because rates formulated in violation of an agreement may nevertheless still be nondiscriminatory and within the zone of reasonableness. Accordingly, shippers may be unable to show the damages necessary to justify reparations under 49 U.S.C. 11705(b)(3). The court of appeals' rule, which limits the Commission to prospective cancellation and damages awards, would thus permit carriers to benefit from improperly established rates until the violations are discovered.[24] By denying the

[24] None of the statutory alternatives to rejection noted by the court of appeals (Pet. App. 27a) prevents carriers from benefiting from an unlawfully established rate. The prescription remedy (see 49 U.S.C. 10704(b)(1)) is prospective only, and, like the ability to recover damages, is significant only if a rate is shown to be unreasonably high. The alternative of cancelling an unlawfully established tariff for the future would allow the carrier to retain all charges already collected under an unlawful rate, and thus has little deterrent value. Although antitrust remedies may often be available against a carrier that violates a rate bureau agreement, the Commission cannot impose them. It is important that the Commission, which is responsible for enforcing a rate bureau's com-

Commission an effective enforcement tool, the court of appeals' ruling makes it more likely that rates will be formulated in violation of bureau agreements by providing carriers an incentive to do so.

The court below appears to have been concerned (Pet. App. 28a) that the Commission will routinely reject effective tariffs for insignificant errors and therefore will "create a legalized but endless chain of departures from the tariff." But this fear is unfounded. The Commission has discretion to accept tariffs that are not in perfect compliance with statutory requirements. See *Providence & Worcester Co.* v. *United States*, 666 F.2d 736 (1st Cir. 1982). Indeed, the Commission, on numerous occasions, has itself recognized that overcharge liability may be unfair where a defect causes no real harm or where a carrier had no clear notice of what was expected. See *Genstar Chemical, Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982); *National Insulation Transportation Committee* v. *ICC*, 683 F.2d 533 (D.C. Cir. 1982). Consistent with that approach, the Commission proposes to reject tariffs after they have gone into effect only for "significant" agreement violations. For example, the Commission might reject tariffs filed by carriers which had engaged in collusion without benefit of an approved agreement; or tariffs based on agreements on single line rates between direct competitors after 1983; or a tariff filed on behalf of a member of a rate bureau that did not reflect his independent action (see n.27, *infra*).[28] In every case under the rule at issue here, the Com-

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pliance with its approved agreement, have the power to impose sanctions for noncompliance (Pet. App. 24a-25a).

[28] In general, rejection will be used for the sort of violations which, if discovered before the rates became effective,

mission will have found, after hearing, both that there has been a clear and substantial violation of the agreement that confers antitrust immunity, and that rejection is the most appropriate remedy.[26]

2. a. Cases addressing analogous problems support the conclusion that rejection is a reasonable enforcement device. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, 350 U.S. at 347, this Court held that a new rate schedule, purporting to change a contractual natural gas rate in a manner unauthorized by the Natural Gas Act, was a "nullity", that there was "no doubt" that the Federal Power Commission could reject such a schedule, and that all amounts paid under the illegal schedule should be refunded. Since the collective establishing of rates in violation of approved rate bureau agreements constitutes a violation of highly significant provisions of the Interstate Commerce Act, the ICC should have similar power to correct these violations.

Several lower courts have affirmed the principle that carriers may not avoid overcharge liability for defects discovered after a tariff has gone into effect.

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would lead to suspension. See *Reclassification of Pork Skins & Bacon Rinds, NMVC* (ICC I & S, Docket No. M-30360) (Aug. 4, 1982), pending review sub nom. *National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.); cf. 49 U.S.C. 10706(b)(3)(B)-(D), Pet. App. 35a-58a.

[26] For this reason, fears that the rejection power will lead to windfall profits for shippers (cf. 82-707, Pet. 15-16) are without foundation. Moreover, where a carrier misquotes a rate and initially collects less than the tariff rate, the shipper is bound to pay the established rate when the error is discovered, even if the shipper has relied on the lower rate in making shipments and establishing prices. *Louisville & N. Ry.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & P. Ry.* v. *Mugg*, 202 U.S. 242 (1906).

Chicago, M., St. P. & P. R.R. v. *Alouette Peat Products, supra,* involved a suit by shippers to recover overcharges because a rate increase was made effective on less than statutory notice. The court held that effective rates filed in violation of tariff publishing requirements could not be collected. The court stated that it was clear that if, on complaint to the Commission, a filed rate was proved to be unreasonable, the shipper was entitled under the Act to recover the difference between what it had paid and what the Commission found to be reasonable. The court saw no reason why a shipper should not be similarly protected where the rate is unlawful because it was not lawfully published (253 F.2d at 455). The court stated (*id.* at 456):

> A rate which is in fact unreasonable is not made reasonable by the mere act of filing, nor does the mere act of filing make lawful a publication not made in accordance with the provisions of the Act. Filing does not constitute publication, or cure a defective publication.

The court concluded that shippers were entitled to recover all sums paid in excess of the rate that had existed prior to the improperly established charges, since the preexisting rate was the only existing legally published rate. *Id.* at 456.[27]

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[27] In *Axinn & Sons Lumber Co.* v. *Long Island Ry.*, 466 F. Supp. 993 (E.D.N.Y. 1978), the court applied *Alouette Peat* and held a tariff provision void ab initio because it was published in violation of the Interstate Commerce Act. There, the Long Island Railroad was a party to joint rates, which the rate bureau to which Long Island belonged decided to increase. Although Long Island declined to agree with the increase (known as "flagging out"), the bureau published the increase for Long Island's account anyway. Making Long

Most recently, in *Aberdeen & Rockfish Ry.* v. *United States*, *supra*, the court upheld the Commission's authority to impose overcharge liability for improperly symbolized rate increases. The court observed (682 F.2d at 1104) that because the Commission can no longer afford to police the thousands of rate changes that are published weekly, it must shift the burden of ensuring exact compliance with symbolization requirements to the carriers themselves. In rejecting the carriers' claim that overcharge liability would be unfair, the court stated (682 F.2d at 1105):

> The predictable decline in intentional or negligent symbolization errors compensates, at least arguably, for the possibility of recovery by an unharmed shipper. After all, it is clear that a carrier is not *entitled* to a rate increase, just or otherwise, that has not been filed in the prescribed manner. Moreover, the Commission is correct in pointing out that the carriers can prevent windfall recoveries simply by carefully carrying out their own legal obligation to mark their rate increases.

Similarly, no liability will be incurred under the rules at issue in this case if carriers comply with the limitations in their approved rate bureau agreements.

Island a participant in the increases violated a Commission regulation and the rate bureau provisions of the Act. The court held that the increased tariff was void ab initio, because Long Island's concurrence was a prerequisite to a lawful tariff. Accordingly, the shippers could recover overcharges, because the increased tariff never went into lawful effect. Significantly, the court's holding did not depend on a finding that the increased rate was unreasonable. Rather, the court recognized that the increase with respect to Long Island was a nullity from the outset.

In sum, a tariff that has gone into effect establishes the rate which shippers must then pay. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981). But such a rate is not necessarily a "lawful" rate; the Commission may, upon investigation, find it to be unreasonable or otherwise unlawful. *Arizona Grocery Co.* v. *Atchison, T. & S. F.*, 284 U.S. 370, 384 (1932); *United Gas Pipe Line Co., supra*; *Board of Trade* v. *ICC, supra*, 646 F.2d at 1192. In such a case, public policy requires that carriers should not be allowed to benefit from the unlawful tariff publication. See *Midlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212, 238-239 (8th Cir. 1970); *ICC* v. *B&T Transportation Co.*, 613 F.2d 1182, 1183-1186 (1st Cir. 1980); *H.J. Baker & Bros., supra*, 357 I.C.C. at 644-645; *Acme Fast Freight Inc.—Common Carrier Application, supra*, 17 M.C.C. at 556, 557.

2. b. The cases upon which the court of appeals relied do not contravene the Commission's power to reject tariffs after they have become effective. The court of appeals asserted (Pet. App. 28a) that *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), establishes the proposition that illegality does not render a rate nonexistent or subject a carrier to overcharge liability. But that case will not support such a sweeping conclusion.[28] In *Davis*, a shipper had paid the lawful rate for shipping a commodity between two points. The carrier had also published a lower rate for a longer haul including those points without obtaining the required permission from the Commission to

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[28] *Davis* dealt with an entirely different part of the Act than is in issue here; it was decided 24 years before the Reed-Bulwinkle Act, authorizing rate bureaus, was enacted.

charge less for the longer haul than for the shorter haul. The shipper argued that the low rate for the longer haul—which was a rate forbidden by the Act—should now automatically become the maximum rate for all shorter hauls along that route, and hence that it was entitled to recovery for overcharges. Relying upon a consistent Commission practice of denying refunds for such violations without a showing of injury, the Court rejected that contention, explaining that "mere publication of the forbidden lower rate did not wholly efface the [properly published] higher intermediate one from the schedule and substitute for all purposes the lower one" (264 U.S. at 424-425) and that the shipper was limited to a damages remedy. The rationale of *Davis* does not apply to the instant situation. In *Davis*, the issue was whether the illegal lower rate automatically effaced the lawful higher rate, without any Commission intervention. Here, in contrast, the issue is whether the Commission can efface an illegally published rate in the exercise of its discretion to select appropriate remedies for violations of the Act. The Court's affirmance in *Davis* of the Commission's decision not to remedy violations of the long and short haul clause by using the offending ("forbidden") tariff as a rate floor does not suggest that the Commission has no power to reject rates that have been adopted in violation of express provisions of the Act. Indeed, to the extent *Davis* has any application at all to this situation, it supports the Commission's rule, because the Court refused to give the shipper the benefit of the "forbidden" rate. Here, the Commission proposes to deny the carrier any benefit from forbidden violations of rate bureau agreements.[29]

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[29] In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), cited by respondents in their brief

Nor does *Delta Air Lines, Inc.* v. *CAB, supra*, upon which the court below also relied (Pet. App. 28a), preclude ICC rejection of effective tariffs that violate rate bureau agreements. The court in *Delta* found that the CAB would have exceeded the limits of its delegated authority even if rejection had occurred prior to the tariff's effective date (543 F.2d at 259, 261, 264). This is plainly not the case here, because the court of appeals recognized that rate bureau violations may constitute substantial errors warranting rejection. Moreover, the court's primary concern in *Delta* was that the CAB, in violation of its statutory mandate, failed to conduct a required hearing before rejecting an effective tariff (543 F.2d at 259, 261, 267). In sharp contrast, the ICC's rejection provisions allow for complaint, answer, and reply, and fully satisfy the hearing requirement of 49 U.S.C. 10704(b)(2). Finally, the D.C. Circuit itself apparently rejects the Eleventh Circuit's reading of *Delta* in this context, since in its subsequent opinions the D.C. Circuit has viewed broadly the ICC's discretion to exercise its rejection authority. *North Central Truck Lines, Inc.* v. *ICC*, 559 F.2d 802, 803 (1977); *Genstar Chemical, Ltd.* v. *ICC*, *supra*. Thus, the D.C. Circuit has recognized the Commission's discretion to use its rejection remedy where it believes appropriate, and has never indicated that the ICC could not reject an effective tariff when the agency found it necessary to do so. In fact, in *Genstar*, the court specifically referred to the Commission's recent adoption of rules permitting it to require a refund of "all charges collected pursuant

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in response to our petition (at 5-6), the Court simply held that the alleged informalities were not grounds for invalidation of the tariff. See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907).

to an improperly symbolized tariff" without suggesting that such rules exceeded the Commission's authority (665 F.2d at 1309).

The court of appeals also relied on *Genstar, supra*, but that case supports the Commission's tariff rejection rule, because it reaffirms the Commission's broad authority to fashion the most appropriate remedy for a given violation of the Act. 665 F.2d at 1309-1310 & n.3.[30] In *Genstar*, the Commission had already established 12% as the maximum reasonable rate increase, and carriers published a 14% increase. In that situation, forcing the carriers to refund the patently unlawful 2% difference was the most equitable and effective way to enforce the Act's mandate that rates be reasonable. See also *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179 (2d Cir. 1973), clarified and aff'd on rehearing, 496 F.2d 21, cert. denied, 419 U.S. 884 (1974). Here, in contrast, the *Genstar* remedy is not an effective remedy, because shippers may be unable to prove that even a rate formulated in blatant violation of a rate bureau's agreement is outside the zone of reasonableness. The fact that a remedy happened to be particularly appropriate in a case involving rate reasonableness, like *Genstar*, is no reason to confine the Commission to using the same remedy where it is entirely inappropriate, as in a case where carriers have developed a rate in clear violation of their approved agreement.[31]

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[30] That authority has been repeatedly recognized. *TAPS, supra*, 436 U.S. at 654-657; *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962); *Moss* v. *CAB*, 521 F.2d 298, 304 (D.C. Cir. 1965), cert. denied, 424 U.S. 966 (1966).

[31] The court of appeals also quoted (Pet. App. 8a) this Court's decision in *TAPS, supra*, 436 U.S. at 640, to support the proposition that rejection can only occur before a rate

In sum, only the Eleventh Circuit has held that the Commission can never reject tariffs after they have gone into effect. All of the other courts that have addressed analogous issues have concluded that the Commission (or analogous agencies) should have discretion to choose among remedial tools made available by the statute in order to effectuate its purposes. In light of the reasonableness of the Commission's remedial policy choice in this case, and in light of the absence of any statutory indication that that choice is barred, those decisions give strong support to the Commission's rule.

C. The Commission's Order Properly Implements The Policies Of The Act

The court of appeals incorrectly found support for its conclusion that the Act bars rejection of effective tariffs in the policies of the Interstate Commerce Act. The court of appeals held (Pet. App. 28a) that the overcharge liability created by the rejection of tariffs after they have gone into effect[32] undermines the "uniformity and reliability interests" the tariff system was meant to foster. See also *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1378 (11th Cir. 1982). This policy an-

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becomes effective. The quoted language, however, simply states that before the Commission obtained suspension authority in the Hepburn Act of 1906, the only remedy for unreasonably high rates was damages. The Court did not even address the ICC's rejection authority. In any event, the Commission here is concerned not with violations of the reasonableness statute, 49 U.S.C. 10701(a), but with violations of the rate bureau provisions in 49 U.S.C. 10706(b).

[32] The Commission does not itself award overcharges to shippers via motor carrier. Instead, to obtain enforcement of a Commission rejection order, a shipper will have to bring a civil action in district court. See 49 U.S.C. 11705(a).

alysis is faulty for two reasons. First, the court below ignored the fact that the Motor Carrier Act of 1980, 49 U.S.C. 10101 *et seq.*, has reduced the prior emphasis on rate uniformity by encouraging increased competition among carriers; carriers may now offer a variety of quality and price options to shippers. Regarding rate bureaus specifically, Congress recognized that the bureaus promoted predictability in rates, but then deliberately took elaborate steps to inject more competitive pricing into the motor carrier rate system. For example, it prohibited collective action in regard to certain matters—including single line rates [33] and certain rates that reflect limitations on liability—and placed strict limitations on rate bureau treatment of independent actions by bureau members.[34] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27-28 (1980). Thus, the emphasis of the court of appeals on the importance of rate uniformity is inconsistent with the most recent expression of Congressional policy.

Second, even if tariff uniformity were still a primary statutory goal, rejection of effective tariffs after the full hearing contemplated by the Commission would not undermine that goal any more than does the complaint procedure accepted without question by the court of appeals (Pet. App. 27a 28a).

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[33] The prohibition on collective ratemaking for single line rates was to become effective in 1984, in order to give the carriers time to adjust their pricing procedures (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 28 (1980)). Congress thus evidently anticipated that the changes in the statute would encourage individual carriers to establish new, presumably more competitive, prices.

[34] Rate bureaus may not protest independent actions by a member, rate bureau employees may not act on such proposals, and bureau discussions may not include discussions of individual markets or rates after 1983.

The complaint procedure created by 49 U.S.C. 11701 permits a challenge to motor carrier rates at *any* time and provides that a shipper who can show that a rate is unreasonable is entitled to damages—that is, to a refund of the unreasonable portion of the rate. 49 U.S.C. 11705(b)(2) and (3). Thus, the mere fact that a rate is effective can never assure carriers that their rates will not be found unlawful, or that they will not have to make refunds to shippers.

In sum, the holding of the court of appeals that the Commission can never reject an effective tariff is not compelled by statute, legal precedent or policy. Moreover, the Commission's decision to invalidate tariffs found to have significantly violated an approved motor carrier rate bureau agreement is an appropriate exercise of agency discretion, and properly implements the policies of the Act by denying carriers a financial incentive to attempt to charge rates in violation of rate bureau agreements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Interstate Commerce Commission

SEPTEMBER 1983

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No. 82-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, et al.,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR RESPONDENTS

Burton [illegible]

Pamela [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

QUESTION PRESENTED

Did the Court below err in holding that the Interstate Commerce Commission lacks authority to retroactively invalidate tariff rates that have become effective in accordance with the Interstate Commerce Act's provisions for establishing rates, but which are subsequently found to have been adopted or published under procedures that violated an approved motor carrier rate bureau agreement?

PARTIES TO THE PROCEEDING

The following were original petitioners below and are respondents here: American Trucking Associations, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association, Inc.; New England Tariff Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference. The following were intervenors in support of the original petitioners below: Alaska Carriers Association, Inc.; Bulk Carrier Conference, Inc.; Drug & Toilet Preparation Traffic Conference, Inc.; Heavy & Specialized Carriers Tariff Bureau; Household Goods Carriers' Bureau, Inc.; Motor Carriers Traffic Association, Inc.; National Association of Specialized Carriers, Inc.; National Small Shipments Traffic Conference, Inc.; Ohio Motor Freight Tariff Committee, Inc.; and Steel Carriers' Tariff Association, Inc. The affiliates of respondent American Trucking Associations, Inc. are named in an attachment to the Brief for Respondents filed in this case on May 31, 1983.

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IN THE

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OCTOBER TERM, 1983

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (J.A. 4-16; Pet. App. 32a-72a, 73a-84a, and 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983, and was granted on June 20, 1983 (J.A. 17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10706, 10762, 11701, and 11705 are set forth at Pet. App. 96a-100a.

STATEMENT OF THE CASE

In the proceeding under review below, Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, the Interstate Commerce Commission promulgated a number of rules which purport to interpret and implement certain provisions of Section 14 of the Motor Carrier Act of 1980 governing the operations of rate bureaus. Respondents include the major motor carrier rate bureaus. These rate bureaus perform their functions under procedures set forth in collective ratemaking agreements which are filed with the ICC and which, if they comply with the requirements and restrictions in Section 10706(b) of the Interstate Commerce Act, are required to be approved by the ICC. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

A. The Motor Carrier Act Of 1980 And Its Background

The Motor Carrier Act of 1980 was adopted largely in response to efforts by the ICC to "deregulate" the motor carrier industry by administrative fiat. When Congress began to deal in earnest with motor carrier regulation in 1979, Congressional leaders roundly condemned the ICC's efforts to rewrite the existing regulatory scheme. For example, on October 22, 1979, the Chairman of the Senate Committee on Commerce, Science, and Transpor-

tation, which considered the Motor Carrier Act of 1980, expressed the concern of Congress when he said:

> I do not believe that the ICC should embark upon a course of action to redefine completely and unilaterally our national transportation policies. . . . To borrow a phrase, we are mad as hell, and we're not going to take it anymore. It is time that the agencies began to listen to the Congress, and it is time for the Congress to be much more explicit in the direction that it believes Federal Agencies should be moving.[1]

These sentiments were echoed by other Congressional leaders. For example, during the floor debates on the Motor Carrier Act of 1980, Congressman Harsha, then the ranking minority member of the House Committee on Public Works and Transportation stated:

> In the recent past, the ICC embarked upon a program to review and reevaluate its long-standing interpretations and implementation of the Interstate Commerce Act. In effect, the ICC embarked upon a course of action to redefine completely and unilaterally our national transportation policies. This has contributed to the growing sense that the Government has become so large and unwieldy; that it is virtually out of control. Moreover, there is a widespread belief that the ICC is oblivious to the wishes of Congress. 126 Cong. Rec., H. 5346 (June 19, 1980).

The 1980 Act was intended to restrain the ICC from charting its regulatory course outside the boundaries of its governing statute. After giving paramount importance to the need to "reduce unnecessary regulation," the

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[1] Address by Senator Howard Cannon, Chairman, Committee on Commerce, Science, and Transportation, United States Senate, to ICC Workshop on Motor Carrier Regulation, October 22, 1979.

1980 Act sets forth the following statement of Congressional purpose and intent:

> . . . in order to reduce the uncertainty felt by the Nation's transportation industry, the [ICC] should be given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the [ICC] should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress. Motor Carrier Act of 1980 §§ 2 and 3, 94 Stat. 793, *reprinted at* 49 U.S.C. § 10101 note.

In Section 14 of the Motor Carrier Act of 1980, Congress focused its attention specifically on motor carrier rate bureaus. In the years immediately preceding the adoption of that Act, the ICC had attempted to use its rulemaking authority, in furtherance of its deregulation efforts, to drastically curtail collective ratemaking. For example, in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements*, (43 Fed. Reg. 1809, January 12, 1978), the ICC proposed to do what Congress had specifically declined to do, namely, apply to motor carrier rate bureaus the severe restrictions on collective ratemaking statutorily imposed on rail rate bureaus by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 49 U.S.C. § 10706(a). And, in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 10706(b) Application Proceedings*, (43 Fed. Reg. 1666, January 11, 1978), the ICC undertook to review individual ratemaking agreements to determine if continued approval would be warranted under a new standard adopted by it. The ICC's standard required the parties to an agreement to show not only that the agreement enhanced the goals of the National Transportation Policy (49 U.S.C. § 10101), the only showing then required by stat-

ute, but also that it did not have anticompetitive effects or that, if it did, those effects were outweighed by the benefits to the National Transportation Policy.

In considering the Motor Carrier Act of 1980, Congress was aware that the "Commission has recently embarked upon a series of reviews of rate bureau agreements to determine whether they should be continued and, if so, under what conditions" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27 (1980)). Congress determined to put a stop to these activities by giving the ICC "explicit direction" with respect to the regulation of rate bureaus. As the Court of Appeals noted in its decision:

> Under the prior provisions there were virtually no statutory conditions to the approval of a rate bureau agreement. Instead the ICC was given broad discretion to approve agreements "when it finds that the . . . agreement will further the [national] transportation policy," . . . and was given broad power to require compliance with conditions it considered necessary to further that policy. Under the new provisions, Congress has established a detailed set of conditions for approval and has instructed that a rate bureau agreement "*shall be approved* by the Commission upon a finding that the agreement fulfills each requirement of [the statute], *unless* the Commission finds that such agreement is inconsistent with the [national] transportation policy" (Pet. App. 6a) (emphasis in original).

The legislative history of the 1980 Act confirms that Congress intended to reduce the ICC's discretion with respect to the regulation of rate bureaus. The House Report states that:

> . . . the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-

> hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow and reducing the discretion of the Commission to expand those limits (H.R. Rep. No. 96-1069, *supra*, at 29).

Section 14 of the Motor Carrier Act of 1980 covers such minute details as the time limits for bureau decision-making on rate proposals, a requirement that proxies be in writing, a restriction against bureau employees acting on proposals, and a requirement that upon request, the bureau must divulge to any person the name of the proponent of a proposal. With respect to remedies for violations of rate bureau agreements, however, the 1980 Act made no changes other than to place new limits on the existing remedies. The existing remedies in 49 U.S.C. § 10706 (f) and (g), which authorize the ICC to change the conditions of approval or terminate an agreement, were made subject to the new burden of proof provisions in 49 U.S.C. § 10706(b). In other words, the ICC can no longer take such action *unless* it finds that the agreement is *inconsistent* with the transportation policy. Moreover, the 1980 Act added the following provision as new § 10706(b)(3)(E):

> In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.[2]

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[2] This provision was designed to protect from harassing antitrust litigation carrier members of a bureau which engage in consciously parallel pricing with respect to rates which the Motor Carrier Act of 1980 withdrew from their collective consideration, *e.g.*, zone or rate freedom or new released rates (see 49 U.S.C. § 10706(b)(3)(C)). As to

B. The ICC's Response To The Motor Carrier Act Of 1980

Following enactment of the Motor Carrier Act of 1980, the ICC discontinued its Ex Parte No. 297 (Sub-No. 3) and (Sub-No. 4) proceedings, indicating that the new standards and restrictions proposed for adoption in those proceedings had been displaced by Congressional mandate. It subsequently instituted Ex Parte No. 297 (Sub-No. 5), however, purportedly to "interpret and implement" the "new requirements and standards" imposed on motor carrier rate bureaus by Section 14 of the Motor Carrier Act of 1980. Notice of Proposed Policy and Notice of Interim Requirements (J.A. 4). The ICC's Notice made immediately effective without observance of the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, a series of so-called "interim" rules governing the operations of rate bureaus.

In its Notice, the ICC observed that the new burden of proof and parallel pricing provisions in § 10706(b)(3)(E) made it "extremely difficult" for a party to show that a violation of a rate bureau agreement occurred (J.A. 8). Moreover, it found "troublesome" the "lack of definite remedies for proven violations" other than "the obvious potential remedy of withdrawal of immunity" (J.A. 9). It proposed, therefore, to adopt a new "standard that provides that proof of significant violations of an agreement . . . will automatically result in tariff rejection" (J.A. 9). The ICC proposed to suspend and investigate tariff items

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an identical provision made applicable to rail rate bureaus by section 109 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10706(a)(3)(C)(i), the drafters of the Senate Report stated that the provision "is consonant with the intent of Congress . . . to remove the threat of antitrust litigation in the courts with regards to rate bureau practices which are consistent with the public interest" (S. Rep. No. 94-499, 94th Cong., 2d Sess. 56 (1976)).

where "the allegations of improper activity are not sufficient to warrant rejection" (J.A. 9).

The respondent carrier organizations, joined by two national organizations representing shippers, petitioned the Court of Appeals for review of the interim rules and moved for a stay of the rules *pendente lite*. The Court granted the motion for stay. While the petition for review was pending the ICC issued its final rules, and the Court granted a motion to amend the petition to embrace the final rules.

Notwithstanding the objections of two of its members, the ICC adopted a final rule authorizing the rejection, pursuant to 49 U.S.C. § 10762(e),[1] of bureau tariffs "which have been adopted or published under procedures which violate approved agreements" (Pet. App. 68a). The rule provided that a "shipper may file a verified complaint seeking to have tariff material stricken before or within 60 days after the effective date of the tariff" (Pet. App. 68a). An employee board, the so-called Tariff Integrity Board (TIB), would initially entertain all allegations of violations of rate bureau agreements. The results of the TIB's investigations and its recommendations would be submitted to the ICC for action. The ICC also announced its intention to suspend and investigate tariffs on the basis of alleged agreement violations, reasoning that: "As we have the power to strike or reject a tariff for these violations, we clearly have the power to take this less drastic action" (Pet. App. 68a).

[1] Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations issued thereunder.

C. The Court Of Appeals Proceedings

The Court of Appeals struck down the ICC's rule authorizing rejection or suspension of tariffs for violations of rate bureau agreements. Construing 49 U.S.C. § 10762(e), the Court noted that "the plain meaning of rejection is to refuse to receive" and that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date, . . . [and] an investigation is the only mechanism available for challenging *effective* tariffs' " (Pet. App. 28a, emphasis in original). The Court further noted that "there are compelling reasons to restrict rejection to the period before a rate becomes effective" (Pet. App. 28a). It stated:

> Because a carrier may charge only the rates on file, and because rejection has the effect of declaring a rate void *ab initio* as if never filed, rejection necessarily carries with it a right to refund for overcharges (in the case of rate increases), measured always by the preexisting rate. This undermines the uniformity and reliability interests that the system of tariff filing was meant to foster (Pet. App. 28a, footnote omitted).

"Review of the statute, the major decisions, and policy," the Court said, "leads us to conclude that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking" (Pet. App. 29a).

Petitioners challenge the Court's findings only insofar as they bar *rejection* of effective tariffs. Petitioners concede that "the tariff suspension provisions of the Act (49 U.S.C. § 10708) . . . are expressly limited to 'proposed' tariffs" (Br. 17).

SUMMARY OF ARGUMENT

I.

In adopting its tariff rejection rule, the ICC ignored the will of Congress. In the Motor Carrier Act of 1980, Congress gave the ICC "explicit direction" with respect to the regulation of rate bureaus, and warned it not to go beyond the statutory limits. Congress deliberately chose not to expand the existing remedies for violations of rate agreements, which limit the ICC to changing the conditions of approval or terminating the agreement. Indeed, Congress placed new limits on the existing remedies in the 1980 Act.

Under these circumstances, the existing remedies are necessarily exclusive. Nevertheless, under the guise of "interpreting and implementing" the new statutory provisions, the ICC created an entirely new remedy for violations of rate bureau agreements.

In adopting its tariff rejection rule, the ICC relied on 49 U.S.C. § 10762(e). Section 10762 sets forth detailed procedures for establishing and changing rates and provides that the ICC may reject a tariff if it violates that section or the regulations of the ICC carrying out that section. Clearly, however, the ICC cannot reject tariffs for violations of rate bureau agreements, for such violations are neither violations of Section 10762 nor of the ICC's rules "carrying out" that section.

Apart from the question of whether the ICC can reject tariffs for violations of rate bureau agreements, it can never reject effective tariffs. The statute and the caselaw limit the ICC's rejection power to use only against proposed tariffs.

Under the statutory scheme, the ICC has the power to investigate effective rates and if it determines that a rate

is unlawful, it can order the carrier to stop the violation. It can also prescribe a new rate to be followed in the future. Because the ICC's rejection and investigation powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with 49 U.S.C. § 10762, the ICC also has the power to suspend a proposed rate for a limited period of time pending an investigation into its lawfulness. The ICC may take whatever action on such a rate as it could in a proceeding begun after a rate became effective.

If the ICC's interpretation of its rejection power is correct, its investigation authority and its suspension power are superfluous. It would not need authority to suspend proposed rates or order existing rates cancelled prospectively if at any time it could order such rates cancelled retroactively.

In addition, the Interstate Commerce Act provides a 30-day public notice period during which objections may be filed against proposed rates and the ICC may determine whether to reject or suspend them. What the ICC has attempted to do here is to extend this statutory period to 60 days after the tariffs have become effective. The statute specifically authorizes the ICC to "reduce the notice period." However, it gives the ICC no authority to extend it.

The decision below is also supported by the relevant caselaw. Of the four decisions by the Courts of Appeals that have squarely considered the question, three hold that the rejection power may not be used to retroactively invalidate effective tariffs. The one decision which holds to the contrary is pending before this Court on petitions for certiorari. That decision is plainly wrong. It ignores the context in which the rejection provision is found and

reads it as broad authority to reject tariffs at any time. It also ignores the "plain meaning of rejection" and the fact that had Congress intended the provision to be so read, it would not have found it necessary to empower the ICC to suspend proposed tariffs or investigate and cancel effective tariffs.

The other cases upon which the Government relies do not support its position. While it has been held that rates which were not filed in accordance with the Act's provisions for establishing rates, i.e. the mandatory 30-day notice provisions, had not been "legally established," it has been held that rates which were filed in accordance with those provisions but not in accordance with the ICC's additional requirements had been "legally established." Moreover, only one case holds that an illegality in filing renders a tariff nonexistent and subjects the carriers to liability for overcharges based on the prior rates. That case is in conflict with the decisions of this Court. Other courts of appeals and the ICC itself have refused to follow it.

II.

This Court has previously held that an effective tariff may not be treated as nonexistent because of some illegality, thereby rendering the carriers strictly liable for refunds measured by the preexisting rate without regard to whether the shippers suffered actual harm. Yet this is precisely the result that would be reached under the ICC's interpretation of its tariff rejection authority. The unfairness of this result can best be demonstrated by reference to the ICC's new tariff missymbolization rule that is the subject of related petitions for certiorari pending before the Court.

The tariff missymbolization rule would impose extraordinary liability on carriers for what amount to noth-

ing more than clerical or typographical errors. The rule provides that "[c]hanges resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectible."

The petitioner representing motor carriers explained that numerous tariffs make reference to the National Motor Freight Classification, which it publishes, and it is impossible to know what effect a change in the Classification will have on the rates and charges set forth in other tariffs. Hence, technical violations of the new rule will be unavoidable. Moreover, a single change in the Classification may apply to shipments handled by more than 3,000 carriers and rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day. While the ICC acknowledged that in certain instances tariff publishers "may not be able to gauge the exact effect of all tariff changes," it denied any relief from its rule.

The reviewing Court believed that the ICC would retain "sufficient discretion under the new regulation to take account of special cases in determining liability." However, the ICC will have no say in the matter because it has no jurisdiction over overcharge claims against motor carriers. A shipper's *only* remedy under the Interstate Commerce Act is to institute a "civil action."

Moreover, since the ICC has flatly declared that missymbolized increases are "invalid and not collectible" a court will not be in a position to exercise "discretion" either. Hence, a rule of absolute liability will be established in these cases, and the ICC will have reduced the requirement that a shipper bring a "civil action" to a mere formality.

ARGUMENT

I. The ICC Exceeded The Limits Of Its Rulemaking Authority.

As this Court has stated, an agency's rulemaking power is sharply limited by two constraints. First, the power to adopt rules is no more than the power "to carry into effect the will of Congress." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976). Second, the power is "bounded by the limits of the regulatory system of the Act which it supplements." *American Trucking Associations* v. *United States*, 344 U.S. 298, 313 (1953).

A. In Adopting The Tariff Rejection Rule, The ICC Ignored The Will Of Congress As Expressed In The Motor Carrier Act Of 1980.

(i) Congress gave the ICC explicit direction with respect to the regulation of rate bureaus and warned it not to go beyond the statutory limits.

The central issue in this case—whether the ICC exceeded the scope of its rulemaking authority—must be addressed in the context of the fact that the Motor Carrier Act of 1980 virtually eliminated the ICC's regulatory discretion with respect to rate bureaus. The express purpose of that Act was "to reduce unnecessary regulation by the federal government" and "to reduce the uncertainty felt by the Nation's transportation industry" as a result of the ICC's efforts to chart its own regulatory course (Sections 2 and 3, 94 Stat. 793). To accomplish these goals, Congress found that the ICC "should be given *explicit direction* for regulation of the motor carrier industry and *well-defined parameters within which it may act pursuant to congressional policy*" (Section 3, 94 Stat. 793) (emphasis supplied). The ICC, Congress warned, "should not attempt to go beyond the powers vested in it by the

Interstate Commerce Act and other legislation enacted by Congress" (Section 3, 94 Stat. 793). As the drafters of the Act put it, the explicit terms of the Act represent Congress's reaffirmation of "its role to control and set policy and guidelines for the conduct of interstate commerce" (H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 1 (1980)).

Section 14 of the Motor Carrier Act is a "clear example" of Congress's plan to give "explicit direction" to the ICC (H.R. Rep. No. 96-1069, *supra*, at 29). The ICC had, in recent years, ambitiously worked to refashion the collective ratemaking process according to its own regulatory agenda. In order to eliminate the resulting uncertainty over the future of rate bureaus, Congress "define[d] the limits which it believes the Commission should follow [in the regulation of rate bureaus] and reduce[d] the discretion of the Commission to expand those limits" (H.R. Rep. No. 96-1069, *supra*, at 29). Thus, the Section 14 amendments spell out in explicit detail those requirements and restrictions which Congress found should govern the collective ratemaking process.

(ii) Congress deliberately chose not to expand the existing remedies for violations of rate bureau agreements.

Significantly, Congress made no change in the statutory provisions dealing with remedies for violations of rate bureau agreements, other than to *limit* the existing remedies in the new burden of proof and parallel behavior provisions. 49 U.S.C. § 10706(b)(2), (3)(E), (f) and (g). The existing remedies authorize the ICC "to begin a proceeding" to "review an [approved] agreement" and to "change the conditions of approval or terminate it when necessary to comply with" 49 U.S.C. § 10706(b). The Act confers no right to damages for violations of rate bureau

agreements. Had Congress, which had exhaustively studied the rate bureau process and prescribed detailed procedures to govern it, desired or intended to impose additional remedies for violations of rate bureau agreements, it obviously would have done so in the Motor Carrier Act of 1980.

(iii) The existing remedies are necessarily exclusive.

Since Congress provided specific remedies for violations of rate bureau agreements and warned the ICC that it should not go beyond the explicit terms of the Act, the existing remedies are necessarily exclusive. As Commissioner Gilliam observed, "the *status quo* remains unchanged in this area and . . . the exclusive remedy is disapproval of the agreements" (Pet. App. 71a).

In its decision (Pet. App. 25a), the Court below makes reference to the second sentence of 49 U.S.C. § 10321(a), which provides in its entirety as follows:

> The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

The Fifth Circuit recently discussed this provision in its decision holding that the ICC exceeded its statutory authority in requiring carriers to reimburse owner-operators for a portion of their fuel costs. *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (1983). The Court pointed out that the provision "is the product of the Revised Interstate Commerce Act of 1978." 698 F.2d at 1274. The purpose of that Act was to "restate in comprehensive form, *without substantive change*, the Interstate Commerce Act and related laws . . ." (H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4-5 (emphasis added). Thus,

the revisions were only clarifying and could not affect the substantive outcome of any issue. Revised Interstate Commerce Act, § 3(a), 92 Stat. 1466 (1978).

In the *Central Forwarding* case, the Court traced the origin of the second sentence of section 10321(a) to former section 15 of the Interstate Commerce Act, former 49 U.S.C. § 15. Paragraphs (1) through (15) of section 15 enumerated a number of specific powers of the ICC with respect to the determination of rates, allowances, divisions, routes and practices of railroad and pipeline companies. As the Court pointed out, § 15(16) provided:

> The foregoing enumeration of powers [relating to railroad and pipeline rate regulation] shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter [regulating railroad and pipeline carriers]. 698 F.2d at 1275, note 11.

There was no comparable provision applicable to motor carriers. The Court concluded that "[r]emoved from its statutory and historical content, this provision is practically devoid of meaning, and offers little help in determining whether the Commission is authorized to regulate compensation paid in motor transportation leasing agreements." 698 F.2d at 1274.[4]

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[4] Even if 49 U.S.C. § 10321(a) were applicable to motor carriers, it could not govern the outcome of this case, however, since the Revised Interstate Commerce Act provides that "[l]aws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency." § 3(a), 92 Stat. 1466, *reprinted at* 49 U.S.C. preceding 10101 note. The Motor Carrier Act of 1980 is such a law. By giving the ICC "explicit direction" with respect to the regulation of rate bureaus and providing that the ICC should not "go beyond the powers vested in it," Congress evidenced a clear intent to supersede any laws that could be construed as giving the ICC wide discretion in this area.

In the *Central Forwarding* case, the Fifth Circuit also discussed this Court's decision in *American Trucking Associations* v. *United States*, *supra*, ("ATA"), which the petitioners rely on here. There, this Court held that the ICC could regulate certain leasing practices despite the lack of any express delegation of power under the Interstate Commerce Act. The Fifth Circuit stated:

> Our reading of ATA and related cases is that a general rulemaking provision should be read as a kind of necessary and proper clause. It grants considerable powers to enforce the substantive mandates of federal law governing interstate motor transportation, but is tied to and limited by those specific substantive provisions. It does not open whole new horizons on the regulatory landscape. Congress has not delegated wholesale control of all affairs of motor carriers to the Commission, and it would require more than the language of 49 U.S.C. § 10321(a) to warrant a construction of the Act to that effect. 698 F.2d at 1277-78.

The Court also noted that the Motor Carrier Act of 1980 "changed (or at least made clear) the scope of ICC authority." 698 F.2d at 1277, note 15. Thus, it observed that the "[s]tatutory pronouncements subsequent to *ATA* strongly enforce a state of the law in accord with our reading of *ATA*. The Court concluded:

> ATA is undeniably still good law. . . . It must, of course, be read in light of subsequent statutory developments.
>
> We conclude that the general rulemaking provision imparts power to the ICC only to enforce and carry out the specific substantive mandates enacted by Congress. 698 F.2d at 1278.

It follows from what has been said above that in adopting the tariff rejection rule the ICC ignored the will of Congress. Clearly, the adoption of the rule marks a plain

effort by the ICC to continue its practice of lawmaking by way of rulemaking which the 1980 Act was designed to stop. At least one Commissioner was candid enough to admit this. Commissioner Gilliam warned his fellow Commissioners with respect to the tariff rejection rule:

> Congress has spoken on the question of rate bureaus. We should implement their intent and not attempt to increase our regulation whether it be through actual formal proceedings or through our enforcement efforts.

B. The ICC Cannot Reject Tariffs For Violations Of Rate Bureau Agreements.

(i) The ICC's § 10762 rejection power can only be used for violations of that section or the regulations issued thereunder.

The Interstate Commerce Act limits the ICC's rejection authority by expressly defining it. 49 U.S.C. § 10762(e) provides:

> The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulations of the Commission carrying out this section.

As the Court stated in *North Carolina Natural Gas Corp.* v. *U.S.*, 200 F. Supp. 745, 750 (D. Del. 1961): "The power given to the ICC to reject rates is specific but limited." The ICC may reject a tariff if it violates § 10762, which sets forth detailed procedures for establishing and changing rates, or if it violates the regulations issued thereunder.[5] Since the ICC can only exercise authority granted it by statute, it follows that it has no authority to

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[5] As authorized by 49 U.S.C. § 10762(b), the ICC has promulgated rules prescribing the form and manner in which tariffs are to be published. See, 49 C.F.R. § 1310, the tariff circular rules.

reject tariffs for any other reason. Hence, it cannot reject tariffs for violations of rate bureau agreements, for such violations are neither violations of § 10762 nor of the ICC's rules "carrying out" that section.

In *Delta Air Lines* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976), the Court construed provisions of the Federal Aviation Act which were virtually identical to the provisions involved here. It held that the CAB could not reject tariffs for violations which were neither violations of § 403 of the Federal Aviation Act, 49 U.S.C. § 1373, nor of the CAB's rules issued thereunder.* The Court stated:

> Summarizing the most important aspects of Section 403 and its underlying regulations, we repeat that no other relevant statutory provision authorizes "rejection," and section 403 itself strictly limits the use of this authority to tariff filings that are inconsistent with (1) the form and information requirements of section 403 or (2) the Board's regulations (14 C.F.R. Part 221 (1976)) establishing the proper form and manner for filing, posting, and publishing tariffs. In other words, section 403 only authorizes rejection for technical deficiencies in the form, the manner of filing, and the information content of proposed tariffs. 543 F.2d at 254.

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*The court summarized § 403 of the Federal Aviation Act, as follows:

> It requires every air carrier to file with the CAB tariffs "showing all rates, fares, and charges for air transportation" and "showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." These tariffs must "be filed, posted, published *in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with [section 403] and such regulations. Any tariff so rejected shall be void. . . .*" *543 F.2d at 253* (Emphasis in original).

(ii) The ICC does not have "inherent authority" to reject tariffs for violations of rate bureau agreements.

Reaching beyond the statutory limits on its powers, the ICC asserted that it has "inherent authority" to reject tariffs for violations of rate bureau agreements (Pet. App. 67a). For this odd proposition, the ICC relied on *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 989 (1972). In that case, various municipal electrical distribution systems petitioned for review of a Federal Power Commission order denying the municipal systems' motion to strike certain tariffs filed by Boston Edison Company. In upholding the FPC's order, the Court discussed, in general terms, the FPC's power to reject tariffs. The Court did not state that the FPC's rejection authority was without bounds. Rather, rejection was held appropriate "where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." 450 F.2d at 1346.[7] *Municipal Light Boards*, thus confirms that the tariff rejection authority of a regulatory agency is narrowly circumscribed and available only in cases where the filing is a nullity. It neither holds nor supports the contention that rejection is authorized for any reasons other than those permitted by statute.

Neither does *Acme Fast Freight, Inc. Common Carrier Application*, 17 M.C.C. 549 (1939), sustained *sub*

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[7] Consistent with that standard, rejection was inappropriate in the case before the Court because one of the grounds raised for rejection was subject to factual dispute and the other ground was not sufficiently substantial as to render the tariff a nullity. 450 F.2d at 1347-1348.

nom. Acme Fast Freight v. *U.S.*, 30 F. Supp. 968 (1940), aff'd 309 U.S. 638 (1940), support the ICC's broad view of its rejection authority. That case holds only that the ICC may properly reject a filing which, because it was filed by an unregulated entity, is not really a tariff at all and thus is a substantive nullity. As the lower court held, "The Commission acted under the express authority of the statute in striking the tariffs from its files." 30 F. Supp. at 974.

In any event, the ICC cannot rely on its "inherent authority" to reject tariffs in this case. As shown, the tariff rejection rule finds no predicate in the Motor Carrier Act of 1980. Hence, the ICC did not merely "interpret and implement" the new statutory provisions as it purported to do. Rather, it created a new remedy for violations of rate bureau agreements which was intended to have the force of law. The rule was, therefore, clearly "legislative" rather than "nonlegislative."* As such, the ICC was not entitled to rely on its "implied power to issue nonlegislative rules" (Pet. App. 4a). It could only issue the rule "pursuant to a Congressional delegation of power to issue rules and regulations that have the force of law" (Pet. App. 3a).

C. The ICC Cannot Retroactively Invalidate Effective Tariffs For Any Reason.

Apart from the question of whether the ICC can reject tariffs for violations of rate bureau agreements, it can never reject effective tariffs. As the Court of Appeals stated, "the statute and the caselaw limit [the ICC's rejection and suspension] powers to use only against proposed tariffs" (Pet. App. 31(a)).

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* See the discussion of "legislative" and "nonlegislative" rules in the decision of the Court below (Pet. App. 3a-5a).

(i) **The statute bars retroactive invalidation of effective tariffs.**

The rate regulatory authority of the ICC over motor carriers, set forth in 49 U.S.C. §§ 10762, 10704 and 10708, may be summarized as follows.

Subsection (a) of 49 U.S.C. § 10762 requires every carrier to publish and file with the ICC tariffs showing all of the rates governing the transportation it performs. Subsection (b) authorizes the ICC to prescribe the "form and manner" in which tariffs are to be published and filed. Subsection (c) provides that when a carrier proposes to change a rate, it must publish and file a notice of the proposed change 30 days before the proposed effective date. As shown, the ICC's rejection power is found in subsection (e).

49 U.S.C. § 10704 authorizes the ICC to investigate an effective rate concerning the issue of lawfulness. If, "after a full hearing" the ICC determines that a rate is unlawful, it may "order the carrier to stop the violation." It may also "prescribe the rate . . . to be [thereafter] followed."[9]

Because the ICC's §§ 10762(e) and 10704 powers do not prevent rates that may be unreasonable or otherwise unlawful from becoming effective if they are filed in accordance with § 10762, 49 U.S.C. § 10708 gives the ICC the power to suspend a proposed rate for a limited period of time pending an investigation into its lawfulness. If the ICC does not take final action during the suspension period, the proposed rate is effective at the end of that

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[9] Prior to its recodification, former section 216(e) of the Act, 49 U.S.C. § 316(e), provided that the grant of authority over effective rates was limited to the prescription of rates "thereafter to be observed."

period. 49 U.S.C. § 10708(b). The ICC may take whatever final action on a rate (whether completed before or after the rate goes into effect), as it could in a proceeding begun after a rate became effective. 49 U.S.C. § 10708(a)(2).

If the ICC's interpretation of its § 10762(e) rejection power is correct, its § 10704 investigation authority and its § 10708 suspension power are a nullity. The ICC would not need authority to suspend proposed rates or order existing rates cancelled prospectively if at any time it could order such rates cancelled retroactively.

It is a fundamental principle of statutory construction that "effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant." *In Re Surface Min. Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980), quoting 2A Sutherland, Statutory Construction § 46.06 (4th Ed. 1973). If the ICC's view of the Interstate Commerce Act is correct, then §§ 10704 and 10708 are surely superfluous and insignificant since the ICC would already have the power under § 10762(e) to investigate rates and order them cancelled, not only prospectively, but also retroactively. As the Court of Appeals held, however, the plain meaning of the statutory language contained in § 10762 clearly contradicts the interpretation advanced by the ICC.

In sum, as the statute makes clear, and as this Court held in *T.I.M.E., Inc.* v. *U.S.*, 359 U.S. 464 (1959), the regulatory authority of the ICC over the rates of motor carriers is prospective only, and its orders in the exercise of that regulatory authority can have no retroactive effect. Accordingly, the ICC cannot reject or suspend a tariff, cancel a rate, or declare it "void *ab initio*" retroactively. It can only reject or suspend proposed tariffs and order effective rates cancelled prospectively.

In addition, the statutory scheme of the Interstate Commerce Act makes it plain that the 30 day notice requirement was established to give interested parties an opportunity to object to new or changed tariff provisions before they become effective and to give the ICC an opportunity to examine such provisions and determine whether to reject or suspend them before they become effective. What the ICC has attempted to do here is to extend the notice period to 60 days after the tariffs have become effective. While 49 U.S.C. § 10762(d) empowers the ICC "to reduce the notice period . . . if cause exists," it has no authority to extend that period.

(ii) The decision below is fully supported by the relevant caselaw.

The rule at issue here has its background in two earlier ICC rules involving retroactive rejection of effective tariffs. Until 1979, the ICC examined all proposed tariffs for defects in form during the 30-day public notice period specified in the statute. If errors were discovered, the tariffs were rejected pursuant to 49 U.S.C. § 10762(e) prior to their becoming effective, and the carriers were required to resubmit them in acceptable form. For more than 30 years, the ICC consistently held the view that the "exclusive" remedy for a violation of the tariff filing requirements is rejection prior to the effective date of the tariff. *Shobe, Inc.* v. *Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975); *accord, Atlantic Commission Co., Inc.* v. *Bangor & A. R. Co.*, 226 I.C.C. 651, 688 (1946); *Heavy & Spec. Carriers Tariff Bur.* v. *U.S.A.C. Transport*, 302 I.C.C. 487 (1957).

In July 1979, in a proceeding styled Ex Parte No. 367, *Tariff Integrity Board*, the ICC announced that due to budgetary constraints and an increased number of tariff filings, it had abandoned its practice of comprehensive

tariff examination. Instead a random sampling program was established, which was later changed to a more limited program of title page examination. Because it expected an increased number of defective tariffs to become effective under the new procedures, the ICC proposed to establish a new rule which would permit it to retroactively invalidate effective tariffs for procedural defects on the basis of complaints filed up to 60 days after the tariff had become effective.

Certain of the respondents here challenged both the proposed rule and the decision to abandon the program of comprehensive tariff examination in the United States Court of Appeals for the Fifth Circuit.[10] When the new United States Court of Appeals for the Eleventh Circuit was established, the case was transferred there. In its decision in *Southern Motor Carriers Rate Conference* v. *United States*, 676 F.2d 1374 (11th Cir. 1982), the Court reversed, holding that the ICC did not have statutory authority to adopt the rule. Because it took that action, however, the Court found it unnecessary to reach the question of whether the ICC had improperly abandoned its tariff examining function.

In the meantime, again asserting as justification therefor the earlier decision to abandon its tariff examining function, the ICC adopted the following rule in Ex Parte No. 370, *Tariff Improvement*, 364 I.C.C. 217 (1980):

> Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectable. In such cases, the lawful provi-

[10] The carriers argued that the long-standing program of comprehensive tariff examination was abandoned without notice or opportunity for interested parties to be heard in violation of the Administrative Procedure Act, 5 U.S.C. § 553.

> sions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publication which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication.[11]

Judicial review of this rule was again sought in the United States Court of Appeals for the Fifth Circuit. This time, however, the case was not transferred to the Eleventh Circuit. Thus, the Court was not bound by the earlier decision in the *Southern Motor Carriers* case, and it affirmed the ICC's decision. *Aberdeen & Rockfish R. Co.* v. *United States*, 682 F.2d 1092 (1982).

One of the respondents here, National Motor Freight Traffic Association, Inc., and the nation's railroads filed petitions for certiorari in the *Aberdeen* case, *National Motor Freight Traffic Association* v. *United States* and *Aberdeen & Rockfish Railroad Company, et al.* v. *United States*, Nos. 82-804 and 82-707. In their response to those petitions, the United States and the ICC noted the conflict between the decision below and the *Aberdeen* decision, and stated that they did not oppose the grant of the petitions. They suggested that it would be appropriate for the Court to defer consideration of those petitions until after their petition in this case was filed so that the cases could be considered together. While the Court has not yet acted on the carriers' petitions for certiorari, it is assumed that the *Aberdeen* case will be decided on the basis of the decision here.

In the *Southern Motor Carriers* case *supra*, the Court rejected the same arguments the Government makes here. It rejected the argument that 49 U.S.C. § 10762(e)

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[11] The ICC's tariff symbolization rules require tariff changes to be flagged by designated symbols to denote increases, reductions, or changes which result in neither increases nor reductions in charges.

authorizes the ICC to reject or strike effective tariffs. It stated that "[t]he plain meaning of reject is 'to refuse to receive' or 'decline to accept' " and "Section 10762(e) is worded accordingly." 676 F.2d at 1377. It further stated:

> That § 10762 does not specify rejection of effective tariffs and accords the carrier no procedural rights indicates that Congress intended the consequences of rejection to be minimal, namely refiling. By contrast Congress set out in detail elsewhere in the Act the Commission's power to rectify an effective tariff's substantive violations and the appropriate procedures. Section 10704 gives the Commission power to prescribe reasonable rates after an investigation and full hearing of either proposed or effective rates. When the Commission investigates the reasonableness of proposed rates it may either suspend or let a tariff become effective. §§ 10707 and 10708. 676 F.2d at 1378.

The Court also pointed out that the purpose of § 10762(d) "is to give to the public notice of proposed changes and opportunity to protest." 676 F.2d at 1377. It held that in empowering the Tariff Integrity Board to reject a tariff on the basis of a complaint filed up to 60 days after the tariff became effective, the ICC "in effect extended the public notice period by 60 days." 676 F.2d at 1379.

The Court in the *Southern Motor Carriers* case stated that even if it found § 10762 to be ambiguous, it "would resolve the ambiguity in favor of the Commission only if its construction 'enhance[d] the general policies underlying the legislation.' " The Court held that "[a]lthough the Commission's purpose of bolstering consumer protection in the face of budgetary restraints is consonant with the policies of the Act, the means undercut the Act's goal of market stability and strict application of filed rates . . . by introducing an element of uncertainty in the transportation market." 676 F.2d at 1378 (citations omitted).

In construing provisions of the Federal Aviation Act which were virtually identical to the provisions involved here, the District of Columbia Circuit held that the CAB could not "reserve" the power to reject a tariff after it had become effective. *Delta Air Lines, Inc.* v. *CAB*, *supra*. In its brief, the Government attempts to distinguish *Delta* on the grounds that "the court's primary concern in *Delta* was that the CAB, in violation of its statutory mandate failed to conduct a required hearing before rejecting an effective tariff" (Br. 30). However, as the Court noted in the *Southern Motor Carriers* case, *supra*, § 10762 "accords the carrier no procedural rights." Neither did § 403a of the Federal Aviation Act, 49 U.S.C. § 1373(a) (1970), the procedural counterpart to § 10762, provide such rights. Accordingly, the Court in *Delta* held that rates set forth in an already effective tariff may be cancelled *only* upon a finding of unlawfulness made after investigation and hearing pursuant to § 1002 — the Federal Aviation Act counterpart to § 10704 of the Interstate Commerce Act. 543 F.2d at 268.

In any event, the ICC's tariff rejection procedures do not "fully satisfy the hearing requirements of 49 U.S.C. 10704(b)(2)" as the Government contends (Br. 30). The ICC's rule proposed to use the Tariff Integrity Board procedures (Pet. App. 68a, 78a, 90a). As the Court noted in the decision below a "complaint, answer and response are allowed, but there is no discovery, compulsory process, or administration of oaths" (Pet. App. 26a).

Clearly, therefore, the *Delta* case is on all fours with this case. Contrary to the Government's assertion, the "primary concern" of the Court there was simply that the CAB was exceeding its statutory authority in attempting to defer the question of rejection as to tariffs that had become effective. As the Court put it: "Thus, from the plain words of the statute and from the logic of *CAB* v.

Delta and *Municipal Light Boards*, it is clear that once the Board has permitted a tariff to become effective, it may not reject or suspend that tariff; it may only investigate and take appropriate action after notice and hearing." 543 F.2d at 268. (Footnotes omitted).[12]

Hence, of the four decisions by the courts of appeals which have squarely considered the question, only *Aberdeen & Rockfish R. Co.* v. *United States*, *supra* holds that the rejection power may be used to retroactively invalidate effective tariffs. We submit that the *Aberdeen* decision is plainly wrong.

In *Aberdeen*, the Court ignored the context in which 49 U.S.C. § 10762(e) is found and read it as broad authority to reject effective tariffs. It reasoned that "Congress surely would have limited the reach of section 10762(e) to 'ineffective' tariffs had it intended such a result." 682 F.2d at 1099. The Court held that since the statute does not "place any time constraints on the power to reject," it may be exercised at any time. 682 F.2d at 1098. But this ignores the fact that Congress did limit the reach of the section by its choice of words. As the court stated in the decision below, "the plain meaning of rejection is to refuse

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[12] The other *Delta* case cited by the Court is *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). There the Board purported to "reserve" the power to act on a petition for reconsideration and thereby amend a certificate of public convenience and necessity that had become effective. This Court held that after a certificate vests, the Board may alter it only by following the formal notice and hearing procedures required by the Federal Aviation Act.

In the *Municipal Light Boards* case, *supra*, rejection was held appropriate only as a " 'peremptory form of response to filed tariffs' which classically is used not to dispose of a matter on the merits but rather as a technique for calling on the filing party to put its papers in proper form and order." 450 F.2d at 1346.

to receive" (Pet. App. 28a). Had Congress intended the rejection power to be exercised at any time, it would have the word "strike" rather than "reject." The meaning of strike is "to delete, efface, or cancel something." Webster's Third New International Dictionary. It more appropriately describes the action the ICC is attempting to take here. Had Congress intended such a result, however, it would have also provided procedural rights, and it would not have found it necessary to empower the ICC to suspend proposed tariffs or investigate and cancel effective tariffs.

The other cases upon which the Government relies do not support its position. It relies principally on *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957). In that case, the ICC gave the railroads special permission to make effective on five days' notice specific increased rates. The railroads published, filed, and made effective on five days' notice increased rates in excess of those authorized. In a proceeding brought by shippers to recover overcharges, the ICC found that the increased rates were not published on 30 days' notice as required by the Interstate Commerce Act, and that no permission for less than statutory publication had been given for the increases taken. The ICC found, nevertheless, that the "assailed rates were applicable and are not shown to have been unjust, unreasonable, or otherwise unlawful." 253 F.2d at 454. The Court held that since the statute provided that "no change" could be made in rates "except after thirty days' notice" and "this mandatory provision of the statute concerning publication was not complied with," the involved increases had not been "legally established" and the "only existing legally established" rates were the prior rates. 253 F.2d at 456. The railroads were required "to refund to the shippers the difference between the charges paid under

the unlawful rates and those which would have been charged under the last lawfully established rates." 253 F.2d at 451.

Alouette does not support the Government's position here because *Alouette* involved a violation of the 30-day statutory notice requirement and the rates were, therefore, not made in accordance with the Act's provisions for establishing rates. In its holding that the ICC does not have "authority to repeal that section of the Act of Congress requiring publication in order to establish rate changes," *Alouette* is consistent with the decision of the Eighth Circuit in *Chicago, I. & L. Ry. Co.* v. *International Milling Co.*, 43 F.2d 93 (8th Cir. 1930), *cert. denied*, 282 U.S. 885. There the Court held that a tariff which was filed in accordance with the statutory requirements, but which violated the ICC's tariff publication rules had been "legally established." The Court stated that the authority granted the ICC in 49 U.S.C. § 10762(b) "is not to destroy but to simplify rate schedules by prescribing forms therefor." 43 F.2d at 96. However, in its holding that an illegality in filing renders a rate nonexistent and subjects the carriers to liability for overcharges based on the prior rate, the *Alouette* decision conflicts with decisions of this Court and other courts of appeals.

In *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905, the facts were essentially the same as in *Alouette*.[13] The ICC gave the railroads special permission to increase their rates by not more than 12% on 15 days' notice. The railroads published, filed, and made effective on 15 days' notice rate increases of 14%, or 2% more than the ICC authorized. A

[13] As the Court below noted, "*Alouette Peat Products* was a case on all fours with *Genstar*" (Pet. App. 30a).

shipper brought a proceeding to recover overcharges and, relying on the *Alouette* precedent, sought recovery of the entire 14% increase. The ICC held that the shipper was only entitled to recover the 2% difference between the rates authorized and those charged. The shipper brought suit in the district court, relying on 28 U.S.C. § 1336(a), which gives the district court jurisdiction to review ICC orders "for the payment of money," and moved for summary judgment. The district court granted the shipper's motion, awarding it a full 14% recovery on the theory that the entire increase was unlawful because not lawfully established. *Genstar Chemical Ltd.* v. *ICC*, 491 F. Supp. 391 (D.D.C. 1980). The Court of Appeals reversed the judgment of the district court. In rejecting the shipper's argument that it was entitled to a refund of the entire increase, the Court stated:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate, *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 44 S. Ct. 380, 68 L.Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind-White Coal Mining Co.* v. *Chicago & E. R.*, 235 U.S. 371, 35 S. Ct. 131, 59 L.Ed. 275 (1914). The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity. 665 F.2d at 1308.

The Court further stated:

> To the extent *Alouette Peat* can be read to support the result sought by Genstar, we are persuaded that we should not follow it in the face of contrary Su-

preme Court decisions, Commission precedent, and common sense. 665 F.2d at 1309.

For similar reasons, the Court below held "on the basis of persuasive and controlling authority . . . that *Alouette Peat* was wrongly decided" (Pet. App. 29a). The Court stated:

> This decision seems to us internally inconsistent, contrary to the statute and consistent Commission decisions, and in conflict with Supreme Court precedent. It has caused confusion even within the agency for a quarter century. We therefore decline to follow *Alouette Peat*, as the D.C. Circuit declined to follow it in *Genstar*, *supra* (Pet. App. 30a-31a) (footnotes omitted).

Moreover, the ICC itself has recently refused to follow *Alouette* in a case involving violations of rate bureau agreements. In *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890 (1982), on remand from the decision in *Board of Trade of the City of Chicago* v. *ICC*, 646 F.2d 1187 (7th Cir. 1981), the ICC held that certain tariff changes were established contrary to the notice and hearing procedures set forth in an approved railroad ratemaking agreement. In response to protests, the ICC had ordered an investigation into the lawfulness of the rates and had ordered the carriers to keep account of all amounts received as the result of the application of the tariffs ordered investigated.[14] The protestants sought refunds based on the "keep account" order.

The protestants claimed that the ICC "must order the tariffs stricken" and "treat the unlawfully published tariff . . . as void *ab initio*." The ICC held that "[a]bsent a

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[14] The ICC has authority to enter such "keep account" orders with respect to railroad rates but not with respect to motor carrier rates. 49 U.S.C. §§ 10707 and 10708.

showing of actual harm or other equitable considerations that would demonstrate the reasonableness of such a remedy, we do not believe it is appropriate here." 365 I.C.C. at 898-899. In so holding, the ICC relied on the *Genstar* case, *supra*, and quoted from it the same passage we quote above containing the reference to this Court's decisions in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924) and *Berwind-White Coal Mining Co.* v. *Chicago & E. R.*, 235 U.S. 371 (1914). The ICC concluded:

> This is not to say that the carriers' failure to follow rate bureau procedures is comparable, in terms of the gravity of the offense, to a mere technical tariff publication violation. Nevertheless, the principle of measuring the remedy by the actual harm, rather than treating the offending tariff provision as non-existent, is equally sound here. 365 I.C.C. at 900.

The ICC denied any refunds to the shippers but ordered the tariff provisions cancelled prospectively.

The *Transit* case was decided after the ICC had issued its final decision in the case at bar. Hence, the ICC is proposing to treat violations of motor carrier rate agreements differently from violations of railroad rate agreements. In *Transit*, the ICC followed the statutory procedures and cancelled rates prospectively.[15] It also required a showing of "actual harm." Here, it would ignore those procedures and cancel rates retroactively, without any

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[15] The ICC acted pursuant to its "investigation and suspension" authority in the *Transit* case. Since it also has authority to award overcharges to shippers in railroad cases, it separately considered that issue. The ICC has no authority to award overcharges to shippers in motor carrier cases. See 49 U.S.C. §§ 11705(c)(1) and 10706(b).

showing of harm. As the Government states in its brief, under the procedures involved here:

> A tariff rejected after its effective date is considered void ab initio. Accordingly, because the carrier has collected charges that exceed the applicable rate contained in a properly filed tariff, the carrier is liable to refund, as overcharges, all amounts collected in excess of the rates named in the last lawfully filed tariff . . . . Overcharge liability attaches without regard to whether the rates named in the rejected tariff are otherwise reasonable and nondiscriminatory, and without regard to whether shippers were actually damaged by paying the higher rates (Brief, pp. 7-8) (Footnotes omitted).

The Government does not attempt to justify the ICC's double standard. Rather, it blithely states that here it was the ICC's "considered judgment" that the tariffs "should be voided ab initio and overcharges refunded to shippers" (Brief, 20). What the Government is really saying is that the ICC should be permitted to follow *Alouette* when it suits it and ignore it when it does not.

The other cases upon which the Government relies are inapposite. In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), this Court held that since the National Gas Act does not empower a natural gas company to change its contracts unilaterally, a rate schedule filing was a "nullity" insofar as it purported to change the contract rate. The Court held that the failure of the agency to reject the "unauthorized filing" (prior to its effective date), and "its order 'permitting' the new rates to become effective were in error." 350 U.S. at 347. The Court emphasized that "[i]f the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found

unlawful by the Commission." 350 U.S. at 342. Here there is no suggestion that the carriers lack the power to change their rates. The suggestion is that the ICC can nullify that power at will.

In *Axinn & Sons Lumber Co., Inc.* v. *Long Island Ry. Co.*, 466 F. Supp. 993 (E.D.N.Y. 1978), the Court held that a tariff filing was "unauthorized" and therefore was not "lawfully on file" with the ICC since it had been made without the consent of the carrier on whose behalf it was purported to be filed. As the Court below stated with respect to the similar situation in *Acme Fast Freight, Inc., supra:* "This is an unexceptional result that allows the Commission to toss out irrelevant and unnecessary material because the filing party is not within its jurisdiction" (Pet. App. 29a).

In *H.J. Baker & Bros.*, 357 I.C.C. 640 (1978), the ICC determined that the claims described in *Genstar Chemical Ltd.* v. *ICC, supra*, were in the nature of "overcharges" and thus subject to the three year period of limitations in the Act and not the two year period applicable to damages not based on overcharges. As noted, however, both the ICC and the D.C. Circuit subsequently refused to treat the claims as "overcharges" within the meaning of the statute.

Finally, *Bell Potato Chip Co.* v. *Aberdeen*, 43 M.C.C. 337 (1944) is of little precedential value. This Court refused to follow it in *T.I.M.E. Incorporated* v. *United States, supra*, 359 U.S. at 476-477. While we dispute the Government's claim that "the Commission has long assumed the authority to reject effective tariffs . . ." (Br. 17), this Court answered a similar contention in *T.I.M.E.* as follows:

> Had Congress been asked legislatively to overrule the doctrines enunciated in Bell Potato Chip, supra,

> and declined to do so, that fact would no doubt have been entitled to some weight in our interpretation of the Act. But we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

The cases cited above clearly establish that the ICC lacks the authority to prescribe the rule in issue here. They hold that where Congress has provided the way in which changes in rates are to be made, the ICC cannot say that changes so made are invalid. As the Eighth Circuit put it in the *International Milling* case, *supra:* "Certainly authority does not rest with the [C]ommission to override acts of Congress." 43 F.2d at 96. The Eleventh Circuit stated it only slightly differently in the *Southern Motor Carriers* case, *supra:* "The Commission refers to its dilemma created by a shrinking budget and a growing number of tariff submissions, but the Commission is 'no more authorized than are the courts to rewrite acts of Congress.' " 676 F.2d at 1380. And, the Ninth Circuit said essentially the same thing in the *Alouette* case, *supra:* "No case has been cited by appellants, nor has the Court found one, holding that the Commission has authority to repeal that section of the act of Congress requiring publication [on 30-days' notice] in order to establish rate changes." 253 F.2d at 454.

II. The Retroactive Invalidation of Effective Tariffs Would Have A Devastating Impact On Carriers.

If the ICC's interpretation of its tariff rejection authority is sustained, effective tariffs may be disregarded or treated as nonexistent simply because of some irregularity in the rate bureau or tariff filing process, thereby rendering the carriers strictly liable for refunds measured by the preexisting rates without regard to whether

the shippers suffered any actual harm. The basic unfairness of this result can best be demonstrated by reference to the ICC's new tariff missymbolization rule that is the subject of the pending petitions for certiorari. Unlike the rule involved in the *Southern Motor Carriers* case, *supra*, or the rule involved here, the missymbolization rule has no time limit for bringing claims other than the applicable three year statute of limitations, and it does not apply to rate reductions—only tariffs containing missymbolized increases will be invalidated; those containing missymbolized reductions will remain valid and effective. As the carriers showed in their petitions, the missymbolization rule would impose extraordinary liability on them for what amount to nothing more than clerical or typographical errors. It is partly for this reason that we take with a grain of salt the statement of Counsel for the Government that only the most "serious" violations of rate bureau agreements will result in retroactive rejection. See Brief for the Petitioners, pp. 12, 24-25.[18] In addition, in the light of the ICC's past and current attempts to drastically curtail or abolish collective ratemak-

[18] Moreover, in a decision served September 30, 1983, in No. 39509, *Reclassification Procedures—National Classification Committee*, the ICC has ordered the National Classification Committee (NCC) to show cause why some 144 changes in the National Motor Freight Classification (NMFC) which were "docketed in its name since May 26, 1981 . . . should not be cancelled or rejected." The NCC is composed of 100 elected motor carrier representatives, and is an autonomous standing committee of National Motor Freight Traffic Association, Inc., the agent for publication of the NMFC. It is the ICC's theory that only "specific identifiable carriers" can originate classification proposals. See *Reclassification of Pork Skins & Bacon Rinds, NMFC* (ICC I & S Docket No. M-30360) (August 4, 1982), pending review *sub nom. National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.). Hence, it would require all changes that were not initiated by individual carriers over the past two and one-half years cancelled or rejected, presumably

ing, we are skeptical, to say the least, that the rule will be administered in the manner that Counsel suggests.[17]

The petitioner in No. 82-804, National Motor Freight Traffic Association (NMFTA), is an organization of approximately 3,000 motor common carriers of property. It is the publishing agent of the National Motor Freight Classification, which is the tariff filed with the ICC which contains the classification of property for ratemaking purposes governing transportation by NMFTA's member carriers.

NMFTA publishes hundreds of tariff changes for its members each year. In many instances, it has no way of knowing whether a change published by it will result in increases in the charges of its members. As NMFTA explained in its comments submitted to the ICC, numerous tariffs make reference to the National Motor Freight Classification, and it is impossible to know what effect a change in the Classification will have on charges set forth in the other tariffs. Detailed examples were supplied which showed that technical violations of the new rule will

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retroactively, since the order also provides that "voluntary cancellation will not necessarily absolve carriers of liability for overcharges collected during the time the rates were in effect."

[17] See the ICC's Notice of Proposed Rulemaking, served October 6, 1983, in Ex Parte No. MC-172, *Withdrawal of Antitrust Immunity For Collective Ratemaking On Small Shipments*. There the ICC is proposing "to withdraw antitrust immunity for collective ratemaking activities by motor carriers of property with respect to shipments under 1,000 pounds." The Notice also asks for "[c]omments on the question of whether antitrust immunity should be withdrawn altogether for motor carrier rate bureau activity." The ICC is proposing to take this action notwithstanding the fact that no new legislation has been enacted on this subject since the Motor Carrier Act of 1980 reaffirmed Congress' intention to continue antitrust immunity for such activity.

be unavoidable because NMFTA has no way of insuring that the symbols it chooses are correct with respect to every charge that will be affected by a classification amendment.

Previously there was no penalty for failure to comply with the tariff symbolization rules other than rejection of the tariff prior to its effective date. Under the new rule, however, failure to comply with the tariff symbolization rules may result in astronomical claims against the carriers. A single change in the Classification may apply to shipments handled by more than 3,000 carriers.[18] Rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day.[19]

Under the rule challenged in *Aberdeen*, shippers harboring some knowledge as to a possible cause of action would be encouraged to wait until the applicable three year statute of limitations had all but lapsed before in-

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[18] The participants in the National Motor Freight Classification include freight forwarders, railroads, water carriers, and intrastate motor common carriers, as well as some 3,000 interstate motor common carriers who are members of NMFTA.

[19] As an example, the increases involved in *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (1970), were relatively modest. As shown in the ICC's report, the increases were 5 percent in the less-than-truckload and any-quantity rates and 50 cents in minimum charge per shipment. The increases applied between, to or from points in 18 states, *L.T.L. Class Rates & Minimum Charges — Midwest & Central*, 325 I.C.C. 106 (1965). As the Court pointed out in *Middlewest*, however, those rate increases were estimated to amount to a minimum of $70,000 per day, making the cost for the 16-day period involved in that case at least $1,190,000. 433 F.2d at 216. NMFTA's tariffs apply nationwide to a much larger group of carriers, and a comparable increase would have a far greater impact.

stituting suits. By waiting until the last minute, the shippers, if successful, would recoup the increases charged over the three year period since they would be entitled to a refund of all charges in excess of those provided in the original tariff. And, of course, the rates may have been changed many times since the offending publication was first published—thus compounding the liability.

Because technical violations of the new rule will be unavoidable, and there is a substantial risk that the carriers will be subjected to catastrophic claims for overcharges, NMFTA asked the ICC to limit the application of the rule so that a classification amendment could not be said to be "improperly symbolized" because it ultimately affected carrier charges in a manner which could not be known at the time of the amendment. The ICC acknowledged that in certain instances tariff publishers "may not be able to gauge the exact effect of all tariff changes" (Appendix 15c).[20] Nevertheless, it denied the relief sought on the ground that tariff publishers can file applications seeking "Special Permission" authority to waive the symbolization requirements when they cannot be certain of a change's ultimate effect.

In its petition to reopen, NMFTA showed that the ICC's "solution" to the problem was wholly impracticable. NMFTA explained that since it could not know in advance the effect of the changes, it could not protect itself by applying for "special permission" unless it did so in every instance. Of course, such a requirement would create intolerable burdens on the carriers, the shippers, and the ICC. NMFTA's petition was denied without any discussion of these objections.

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[20] "Appendix" refers to the appendix filed with the petition in No. 82-707.

In its opinion affirming the ICC's decision, the Fifth Circuit offered another "solution" to NMFTA's dilemma. The Court stated that the ICC "retains sufficient discretion under the new regulation to take account of special cases in determining liability" (Appendix 22b). It further stated that "[t]he ordering of a refund for overcharges remains discretionary, . . . and the Commission retains the right to fashion relief appropriate to individual circumstances" (Appendix 23b).

Of course, the problem with the Court's "solution" is that the ICC will have no say in these matters. As NMFTA pointed out, the Interstate Commerce Act specifies the procedures that shippers must follow to recover overcharges from carriers. With respect to rail carriers, the Act provides that a shipper may bring a "civil action" or file a formal complaint with the ICC. 49 U.S.C. § 11705(c)(1). With respect to motor carriers, a shipper's *only* remedy under the Act is to institute a "civil action." 49 U.S.C. § 11706(b). The shipper may bring its action in either a federal or a state court, but in any such case there is no requirement that it be referred to the ICC, as is the case where there is a question of "reasonableness" of rates. See 49 U.S.C. § 11705(b)(3). Hence, the ICC will not be called upon to decide the motor carrier overcharge claims that arise from its rule.

Moreover, by declaring tariff increases void *ab initio*, and ordering them cancelled and the prior rates reinstated, the ICC is leaving nothing for the courts to decide. A shipper will only need to bring its case to court armed with the ICC's determination that a violation occurred to recover the full amount of any increases. Hence, a rule of absolute liability will be established in these cases, and the ICC will have reduced the requirement that a shipper

bring "a civil action" to recover overcharges to a mere formality.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we argued that where a motor carrier rate filed with the ICC seriously violates an approved rate bureau agreement, the Commission does not lose the power to reject the rate under 49 U.S.C. (Supp. V) 10762(e) as unlawful ab initio (and thus to create a basis for overcharge liability) solely because the violation was not immediately discovered and the rate has gone into effect. Respondents and amici Aberdeen and Rockfish Railroad Company present several responses warranting a brief reply.

1. Respondents raise two preliminary arguments that would restrict the Commission's enforcement

powers far more severely than the holding below, which merely limited the ICC's rejection authority under Section 10762(e) to rates that were not yet effective.

a. Respondents first argue (Resp. Br. 14-19) that the Commission may enforce compliance with rate bureau agreements only by withdrawing its approval of the bureau agreements—a remedy expressly conferred by Section 10706 of the Act. Under this theory the ICC may not suspend a tariff that clearly violates a rate bureau agreement even *before* it becomes effective. This argument was correctly rejected by the court below (Pet. App. 24a-28a). Nothing in Section 10706 suggests that it constitutes the sole sanction available to the Commission; nor is Section 10321(a), which broadly authorizes the Commission to adopt regulations to carry out the Act, made inapplicable to the rate bureau provisions. Accordingly, the Commission has ample statutory authority to adopt enforcement sanctions other than disapproval of rate bureau agreements.[1]

b. Second, respondents repeat the assertion (Resp. Br. 19-22)—rejected by the court of appeals (Pet. App. 25a-26a)—that Section 10762's delegation of power to reject tariffs is limited to cases where there is a defect in the *form* of the tariff filing. But the decision below followed law settled by this Court, as well as elsewhere, in holding that the Commission may reject tariffs for substantive as well as formal procedural violations of the Act. *E.g.*, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

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[1] The court of appeals correctly found (Pet. App. 7a) that Congress did not, as respondents claim (Resp. Br. 15, 19),

2. With regard to the specific issue presented in this case—the scope of the Commission's rejection authority under Section 10762(e)—respondents' and amici's legal arguments reduce to two: first, that overcharge liability based on rejection of effective rates is inconsistent with the statutory remedial scheme created by Congress; and, second, that the ICC's assertion of a power to reject effective rates conflicts with the Commission's prior interpretation of its authority under the Act.

a. Respondents and amici argue broadly (Resp. Br. 23-24; Amici Br. 10-14) that using the rejection power to invalidate effective rates would be inconsistent with other enforcement mechanisms available under the Act; they conclude that Congress could not have intended the Commission to exercise this authority. But the Commission found, in adopting the rejection rule, that the alternative remedies do not do the job of effectively policing compliance with rate bureau agreements.

First, it must be remembered that a rate formulated in violation of an agreement may nevertheless still be nondiscriminatory and within the zone of rea-

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"virtually eliminate[] the ICC's legislative rulemaking authority over rate bureau agreements" when it adopted the 1980 Act. In their discussions of the new Section 14, neither the House nor the Senate reports contain any criticism of the Commission's exercise of its authority to approve rate bureau agreements under the earlier statutes. H.R. Rep. 96-1069, 96th Cong., 2d Sess. 27-30 (1980); S. Rep. 96-641, 96th Cong., 2d Sess. 12-15, 30-32 (1980). Moreover, with regard to enforcement, Congress made no effort to limit the Commission's authority over "the processing of loss, damage, and overcharge claims in order to protect the public interest." Indeed, Congress expressly stated its intention "that this legislation [the 1980 Act] not weaken the interest and protection of shippers." H.R. Rep. 96-1069, *supra*, at 40.

sonableness. Consequently, a shipper challenging such a rate may be unable to show damages—necessary to justify reparations under 49 U.S.C. (Supp. V) 11705(b)(3)—even though the rate violates a rate bureau agreement.

Second, the suspension power (49 U.S.C. (Supp. V) 10708)—which is expressly limited to proposed tariffs—is ineffective because the Commission lacks the resources to examine all tariff filings for compliance with rate bureau agreements. Moreover, while shippers typically have both the incentive and the capacity to discover whether tariff filings contain rates that exceed the maximum or that discriminate, they are unlikely to uncover within the preeffective period the antitrust implications lurking behind a filing that violates a rate bureau agreement.

A third alternative remedy—prescription (see 49 U.S.C. (Supp. V) 10704(b)(1))—is prospective only, and, like the damages remedy, is relevant only if a rate is shown to be unreasonably high. The fourth alternative—cancelling an unlawfully established tariff for the future—is also prospective. Since it would allow carriers to retain charges already collected under an unlawful rate, it has little deterrent value.

Finally, contrary to amici's assertion (Amici Br. 13), the penalty provisions of the Act do not create a comprehensive response to the rate bureau problem. Section 11901(b) authorizes civil penalties of only $500 for each violation of Section 10762 and $25 for each day the violation continues. Criminal penalties (see 49 U.S.C. (Supp. V) 11914(a) and (b)) can only be assessed if violations are willful and if the government can prove beyond a reasonable doubt that a violation occurred.

Amici also argue that antitrust liability (see Amici Br. 13, n.23) is a "powerful" and adequate deterrent.

But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). More important, the *Commission* has no power to bring claims against carriers for violations of the antitrust laws. It is critically important that the Commission—the body Congress expressly designated to enforce members' compliance with approved agreements—have the power to impose sanctions for non-compliance. See Pet. App. 24a-25a; *Western Coal Traffic League* v. *United States*, No. 81-4257 (5th Cir. Nov. 14, 1983) slip op. 705-706 n.10; H.R. Rep. 1100, 80th Cong., 1st Sess. 4-6 (1947) (ICC is "the agency which is peculiarly well-qualified" to balance the requirements of the national transportation policy and the limitations of the antitrust laws as required by the Reed-Bulwinkle Act).

In sum, the rejection remedy, sensitively used, is best suited to the task of enforcing compliance with rate bureau provisions. This remedy does not overlap with other sanctions and does not render them superfluous.[2]

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[2] There is no merit to respondents' claim (Resp. Br. 11, 24) that the rejection of effective tariffs makes superfluous the Commission's investigation and suspension authority in 49 U.S.C. (Supp. V) 10704 and 10708, because the Commission "would not need authority to suspend proposed tariffs or order existing rates cancelled retroactively." The Commission has and will continue to use its suspension authority in Section 10708 where a violation of an agreement is shown prior to a tariff's effective date. Similarly, the Commission will use its authority in Section 10704 to prescribe rates for the future—or order a carrier to end a violation—if the violation is not serious enough to merit rejection and if the prerequisites to use of Section 10704 apply. See J.A. 9; Pet. App. 78; *Reclassification of Pork Skins & Bacon Rinds*, NMFC (ICC I&S

b. Although amici concede (Amici Br. 23) that the Commission has on occasion rejected effective common carrier tariffs in the past, respondents and amici assert (Resp. Br. 25-38; Amici Br. 17, 21-27) that the rejection of effective tariffs would constitute a radical departure from past Commission practice and policy. They argue that the authority so to reject should be denied on that ground. They rely (Amici Br. 22; Resp. Br. 25) in particular on cases where the Commission has held that tariffs that are in effect, but which contain technical publishing errors, nevertheless constitute the applicable tariffs, and that carriers are not subject to overcharges for charging rates pursuant to these tariffs. See, *e.g.*, *Shobe, Inc.* v. *Bowman Transportation, Inc.*, 350 I.C.C. 664 (1975).

In fact these cases bear little relationship to the issue involved here—whether the Commission may

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Docket No. M-30360) (Aug. 4, 1982), pending review *sub. nom. National Classification Committee* v. *United States*, No. 83-1866 (D.C. Cir.). Rejection is an alternative remedy designed to apply where suspension is no longer possible and where the Commission believes the violation is serious enough to warrant rejection rather than merely cancellation for the future.

Nor is there a basis for the assertion that the rejection of effective tariffs is contrary to the "goals of promoting certainty and protecting reliance on the filed tariff rates" (Amici Br. 15-16). As we explained in our opening brief (Gov't Br. 33-34), the Motor Carrier Act of 1980, 49 U.S.C. (Supp. V) 10101 *et seq.*, has reduced the prior emphasis on rate uniformity by encouraging increased competition and a variety of quality and price options to shippers. Moreover, even if tariff uniformity were still a primary statutory goal, the Commission's rejection sanction would not undermine that goal any more than does the complaint procedure expressly provided in 49 U.S.C. (Supp. V) 11701. That section permits a challenge to rates at *any* time.

reject effective tariffs reflecting significant violations of motor carrier rate bureau agreements. The decisions cited by respondents and amici reflect the ICC's judgment that, ordinarily, carriers and shippers can protect themselves from tariffs that are too low or too high or discriminatory. So long as the tariff is published and is properly symbolized, the "injured" party is normally on notice—and thus there is, in an ordinary case, no public interest to be served by retroactive invalidation of that tariff. See *Lamb-Fish Lumber Co.* v. *Yazoo & M.V.R.R.*, 42 I.C.C. 470, 471 (1916) (carriers' published rate too low); *Nashville Traffic Bureau* v. *Louisville & N. R.R.*, 53 I.C.C. 37, 38 (1919) (carriers published rate too high).[3] But if the carrier consciously attempts, for instance—in violation of 49 U.S.C. (Supp. V) 10706(b)(3)(B)(v)—

[3] Respondents and amici argue (Resp. Br. 35-36; Amici Br. 24-27) that this Court has upheld the Commission's interpretation of the statute as denying it the authority to reject effective tariffs. But neither decision holds that rejection can never be employed against effective rates. In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), the Court held that the alleged informalities at issue there were not grounds for invalidation of the tariff since the shipper had received notice of the rates to be charged. The Court had no occasion to discuss and certainly did not hold that a tariff can never be nullified after it has gone into effect.

As we explained in our opening brief (Gov't Br. 28-29), the Court in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), did not hold that the Commission is prohibited from rejecting an effective tariff containing a significant violation of a rate bureau agreement. In *Davis*, the issue was whether, absent Commission intervention, the shipper could automatically remedy violations of the long and short haul clause by using the lower tariff as a rate ceiling. The court held that it could not. Here, in contrast, the issue is whether *the Commission* can efface an illegally published rate in the exercise of its discretion to select appropriate remedies.

to conceal its identity as the entity that proposed a rate increase in order to shield itself from economic pressures by shippers and possibly to cover up other illegalities in the way the rate was arrived at, neither shippers nor the Commission would be able to uncover such a violation or its consequences immediately. Under respondents' theory, if the carrier can conceal its illegality for 30 days, it receives the benefit of a tariff that Congress clearly intended to be unlawful, and the Commission is left with an inadequate weapon to protect the public interest. With the rejection power available, not only will the carrier not benefit from the illegal tariff, but also more carriers will simply choose to comply with the requirements of the agreement.

It is noteworthy that neither respondents nor amici cite any cases involving the Commission's policing of the antitrust immunity conferred on rate bureaus by the Reed-Bulwinkle Act in 1948. As we discussed previously, when Congress delegated to the ICC enforcement of the uneasy balance between national transportation policy and antitrust prohibitions, it acknowledged that this regulatory responsibility was quite different from the regulatory role theretofore performed by the Commission. The ICC was here charged with the duty to make certain that the carriers' "relief from the antitrust laws" was warranted by a finding of the Commission that immunity was in "furtherance of the national transportation policy." H.R. Rep. 1100, *supra*, at 5. This obligation was renewed by Congress in 1980 in the Motor Carrier Act, with the admonition that the interests of shippers were to be protected. In fact, it was a major function of Section 10706 to increase competition among carriers by spelling out strict limits on the

permissible scope of collective ratemaking (H.R. Rep. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. 96-641, *supra*, at 13-14). Because Congress went to elaborate lengths to assure that exceptions to the antitrust laws be limited to specifically described categories of action, collective ratemaking should be confined to situations where the carriers have complied scrupulously with the terms of Commission approved agreements. An administrative sanction that will effectively assure such compliance is essential to effective implementation of the statute. The Commission's rejection rule is the logical means of implementing the principle that carriers are not entitled to collect rates that defy the antitrust laws because they reflect serious rate bureau violations.

Since the regulatory problems posed by enforcing the antitrust immunity are often different from those posed by the ICC's traditional role of regulating tariffs, there is no basis for concluding that a remedy thought in a particular case to be unnecessary in the latter context is automatically unnecessary in the former. As previously mentioned, violations of rate bureau agreements are often a highly "invisible" form of violation, not readily apparent to shippers; it is thus perfectly plausible to insist on additional remedial tools to deal with them. In any event, the fact that the Commission has, in some circumstances, refused to assess overcharges for tariff defects in the past simply does not establish that the Commission lacks authority to announce that it will do so in appropriate cases in the future. Thus, to the extent that the rejection rule represents a change in policy, the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'n,*

Inc. v. *Atchison T. & S.F. Ry.*, 387 U.S. 397, 716 (1967). This regulation was adopted in response to the Commission's particular enforcement obligations and capacities as these exist today. This constitutes precisely the type of "change" an agency is justified in announcing through the rulemaking process.

3. Finally, respondents and amici assert (Resp. Br. 38-44; Amici Br. 10-11) that a ruling that the ICC has rejection power will give rise to a parade of horrors. But the horrors are imaginary. They are based largely on hypothetical applications of the "symbolization" rule at issue in *Aberdeen & R. R.R. Co.* v. *ICC*, petitions for cert. pending, No. 82-707 and 82-804 [4]—applications that are inconsistent with the

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[4] Ex Parte No. 370, *Tariff Improvement*, 44 Fed. Reg. 60122 (1980), upheld, *Aberdeen & R. R.R.* v. *ICC*, 682 F.2d 1092 (5th Cir. 1982) petition for cert. pending, Nos. 82-707, 82-804. For an explanation of the Commission's symbolization rule, see No. 82-707 and 82-804, Brief for the Federal Respondents at 2-5.

Amici attempt (Amici Br. 11) to minimize the importance of tariff symbols and to suggest that shippers suffer no adverse consequences from missymbolized rate increases. These assertions are incorrect. The symbolization rules are an integral part of the Commission's program for effective enforcement of the tariff provisions that form the core of the Interstate Commerce Act. As intervening respondents themselves concede (Amici Br. 3), the Act allows "shippers [to] challenge proposed rates." To achieve this "protection for shippers" (*ibid.*), the Commission's filing regulations long have required that all tariffs bear appropriate symbols to indicate whether the tariff increases, decreases, or causes no increase or decrease in existing rates (49 C.F.R. 1300.2(a)(1)). Because tariffs are long and detailed, symbols provide the only practical way for shippers to learn of rate increases in time to exercise their statutory right to protest and seek suspension of those increased rates. If users could not rely on accurate symbols they would have to compare hundreds of thousands of proposed tariff filings each year against existing tariffs. It was to protect tariff users against deprivation—by missymbolization—

regulation as written and interpreted by the Commission. The regulation does not require automatic rejection of a tariff whenever the carrier has violated a rate bureau agreement or missymbolized a tariff. Insubstantial violations, such as those cited by respondents and amici, are not what the rejection rule is designed to remedy.

In the only case applying the new rejection authority, the Commission held that in the specific circumstances of that case the rate bureau violation at issue did not warrant rejection. See *Transit on Wheat Between Reshipping Point and Destination*, 365 I.C.C. 890 (1982). The *Transit* case thus shows that respondents' and amici's fears about harsh or unfair applications of the rejection remedy are unfounded; in motor carrier cases (as well as rail carrier cases) the ICC will use its discretion to reserve the refund remedy to cases of "serious violations." See *Aberdeen & R. R.R.* v. *ICC*, 682 F.2d at 1105. Moreover, rejection decisions always will be preceded by a hearing and are subject to judicial review (*ibid.*).[5] Thus, Amici's hypothetical concerns can be

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of their right to protest rate increases, that the Commission announced its intention, in appropriate cases, to invalidate and make uncollectible improperly symbolized increases and allow shippers to recover amounts already paid as overcharges.

[5] As respondents observe (Resp. Br. 43), the Commission does not itself award overcharges to shippers via motor carrier; to obtain damages on the basis of a Commission rejection order, a shipper will have to bring a civil action in the district court (see 49 U.S.C. (Supp. V) 11705(a)). The statutory scheme thus provides substantial protection for motor carriers. If a court does not believe that the carrier should bear overcharge liability in a particular case, it will not require refunds. See *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*,

corrected by judicial review of specific uses of the rejection power; they provide absolutely no basis for striking down the Commission's rule on its face.[6]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1983

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371 U.S. 84 (1962); *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (8th Cir. 1970).

These various safeguards in the statute and regulation will protect carriers if, as respondents' fear (Resp. Br. 41-42), the Commission penalizes carriers that could not know in advance the effect of a particular tariff change, or if shippers simply wait until the end of the three year statute of limitations period before indicating that a particular tariff was missymbolized. See *Aberdeen and R. R.R.* v. *ICC*, *supra*, 682 F.2d at 1105.

[6] Respondents incorrectly assert (Resp. Br. 35) that the Commission acts unfairly because it treats motor carriers who violate rate bureau agreements more harshly than it does rail carriers. The ICC has held that "actual harm" or other "considerations" must be shown in order to warrant the rejection remedy where shippers allege that a rail tariff violated an approved rate bureau agreement. See *Transit on Wheat Between Reshipping Point and Destination*, *supra*, 365 I.C.C. at 898-899. The *Transit* holding was, however, based "on the circumstances of [that] case," (*id.* at 900) and although the Commission found in *Transit* that shippers had not made a compelling enough demonstration to warrant a refund, the ordering of refunds in future cases remains discretionary, *both* in railroad and motor carrier cases.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has authority to nullify fully effective common-carrier rate tariffs by "rejecting" them retroactively and thereby obligate carriers to refund to shippers transportation charges collected under such tariffs, wholly without regard to whether the shippers have suffered any actual harm.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1643

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, *ET AL.*, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

This brief as *amici curiae* in support of respondents is filed by the railroads of the United States listed in Appendix A to the petition for a writ of certiorari that currently is pending before the Court in No. 82-707. Amici have received and filed with the Clerk of the Court letters from counsel for petitioners and respondents consenting to the filing of this brief.

INTEREST OF AMICI

Amici, which include the principal railroads of the United States, have a direct interest in sustaining the decision below by the Eleventh Circuit. The decision holds that the Interstate Commerce Commission does not have authority under the Interstate Commerce Act ("the Act") to "reject" *effective*

common-carrier tariffs and thus impose private penalties on such carriers without regard to whether shippers have suffered any harm.

Although the railroads are not subject to the motor carrier rate bureau rules that give rise to this case, the railroads—as well as motor carriers—are subject to *another* set of recent rules relating to tariffs. In those new rules, the Commission has (as in this case) claimed power to nullify carrier tariff rates after they have become effective—in that instance, merely for failure to comply with a technical tariff filing formality. See p. 7, below. On review, the Fifth Circuit—in conflict with the Eleventh Circuit in this case—rejected the railroads' challenge to the tariff rules and held that the Commission may nullify effective tariff rates. See *Aberdeen & R.R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982). That decision is now pending before the Court on a petition for writ of certiorari filed by amici.[1]

The Commission's claim of power to nullify effective tariff rates has enormous practical significance for the railroads. Each year, carriers file and place into effect thousands of tariff changes. For decades past, it has been understood that a tariff, once effective, is binding on carrier and shipper alike. See p. 14, below. If the Commission may now nullify transportation rates by striking effective common-carrier tariffs, carriers will be exposed to a vast new refund liability unrelated either to the reasonableness of the rates charged or to any harm suffered by shippers. See pp. 10-11, below. This course was never authorized by Congress, is unnecessary to the enforcement of the Act, and is patently unfair.

STATEMENT

Each year common carriers file and publish thousands of tariffs setting forth new and changed rates for transportation

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[1] See petition in No. 82-707. See also petition of various motor carrier rate bureaus in No. 82-804.

services. This case involves an attempt by the Interstate Commerce Commission to assert a new, discretionary authority to penalize carriers by nullifying their tariffs after they have become effective. Such nullification could render financially hard-pressed carriers liable to refund millions of dollars in tariff charges based on rates that are concededly reasonable.

A. The Statutory Plan Applicable to Common-Carrier Tariffs

One of the central requirements of the Interstate Commerce Act is that common carriers subject to ICC authority may provide regulated services only pursuant to tariffs filed with the Commission.[2] Carriers are specifically forbidden to provide such service in the absence of tariffs and "may not charge or receive a different compensation" than the rate specified in the filed tariff. Section 10761(a). By requiring filed tariffs and strict compliance with them, the Act seeks to avoid unjust discrimination and to give shippers an advance opportunity to challenge proposed rates. To achieve this protection for shippers, while taking account of the interests of carriers, the Act provides a carefully balanced set of explicit procedures, remedies, and penalties.

Chronologically, the first step in fixing a new rate, or changing an existing one, occurs when the carrier files with the Commission a new tariff, which may not take effect until a specified advance notice period has elapsed. Section 10762(a),(c). The same section that governs tariff filings provides that the Commission may reject such a "submitted" tariff if the tariff "violates this section or regulation of the Commission carrying out this section." Section 10762(e). Historically, this tariff rejection authority has been understood as a peremptory power on the part of the Commission to reject

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[2] 49 U.S.C. § 10761(a) (Supp. V, 1981). Hereafter, all references to sections are to the current version of the Interstate Commerce Act printed in Supp. V, unless otherwise indicated.

tariffs filed with it, *before* they become effective, when the Commission notices in the tariff a defect so patent as to make it pointless to consider the tariff under the Act's more detailed provisions.

If the Commission accepts the tariff for filing, the next step under statutory plan allows the Commission to suspend the effectiveness of the new tariff—before it becomes effective—for a limited period of months and to commence an investigation into its lawfulness. Section 10707. If the Commission pursues this course, it can also require the carriers to "keep account" of the revenues collected and to make refunds if the tariffs are ultimately found unlawful. *Id.* The suspension period is limited, however, to a specified maximum after which the tariff goes into effect automatically if the Commission has not completed its inquiry. *Id.* At the end of the investigation, the Commission can also prescribe new rates for the future if the filed tariff is found to be unlawful. Section 10704.

Finally, if the tariff is filed by the carrier and is neither rejected in advance (under Section 10762(e)) nor subjected to suspension and investigation (under Section 10707), it goes into effect. But the shipper may file at any time a complaint that the Commission must decide on the merits. Section 11701(b). In such a complaint proceeding, the carrier may be held liable for "overcharge" liability if it has collected from the shipper more than the rate set forth in the published tariff. Section 11705(b)(1). Alternatively, liability may be imposed under Section 10705(b)(2) and (b)(3) for "damages" if the carrier has collected the published tariff rate but that rate is unlawful under the substantive standards of the Act (*e.g.*, because it is unreasonably high).[3]

The Act also includes an array of specific civil and criminal penalties designed to punish carriers for violations of the Act's

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[3] In such a proceeding, the Commission may also use its prescription power and order adjustment in the tariff rate for the future, if the existing rate is found to be unlawful. See Section 10704.

provisions. Sections 11901, *et seq.* These penalty provisions include not only specific sanctions for such unlawful conduct as the payment of rate rebates (Sections 11902, 11904) and attempted evasion of regulation (Section 11906), but also general sanctions for willful violation of any provision of the Act or any Commission regulation or order.[4] The Act makes no provision, however, for *private* penalties—that is, penalties payable to shippers or other private parties without regard to harm.

B. The Present Controversy

In the past, the Commission maintained a staff of tariff examiners to review each new tariff sheet prior to its effective date. If some patent defect of form or substance was discovered, the Commission usually rejected the tariff *before* it took effect. Under this procedure, the carrier could ordinarily file a corrected tariff without suffering any significant adverse effect.

When some defect was discovered only *after* a tariff had taken effect, the Commission followed various courses depending on the nature and significance of the defect. If the error was merely clerical or typographical, the Commission advised the carrier of the error so that a corrected tariff could be filed and published; if the defect was substantive in character, the Commission could initiate a proceeding to examine the rate's lawfulness under Section 10704. In all events, the Commission did *not* attempt to reject or otherwise nullify effective common-carrier tariffs that were found to be defective.

Recently, however, the Commission has reduced its tariff examination staff and curtailed its review of tariff filings.[5] In place of its traditional tariff review process, the Commission

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[4] See, *e.g.*, Section 11914(a) (fine prescribed for each day a rail carrier violation continues); Section 11914(b) (fine prescribed for each day a motor carrier violation continues).

[5] The Commission now examines only the title page of each proposed tariff for violations of tariff publishing requirements.

has decided that it should exercise a newly invented authority to "impose sanctions" for defective tariff filings. See Pet. Br. 23-24 n.24. Such "sanctions" involve the selective, administrative nullification of tariffs even after they have taken effect. Through such nullification of tariffs, the Commission intends to render carriers liable to shippers for "overcharges," even though the shippers paid no more than the rate clearly set forth in the tariff in effect at the time that their goods moved. See Pet. Br. 7-8.[6]

The Commission's purported source of this tariff nullification power is not Section 10704 of the Act, providing for determinations of the lawfulness of existing tariff rates, or any of the Act's numerous explicit penalty provisions. It is rather the portion of Section 10762—which deals generally with the filing and the publication of tariffs—authorizing the "rejection" of newly submitted tariffs. Section 10762(e). Although nothing in Section 10762 says anything concerning hearing procedures or resort to administrative boards, the Commission has also sought to create an entire administrative system, including an employee board, to implement its newly claimed nullification authority.[7]

This case involves one of two different contexts in which the Commission has sought to assert such authority. In December 1980, the Commission adopted rules under Section 14 of the Motor Carrier Act of 1980, which revised the Interstate Commerce Act's provisions governing motor carrier rate bureaus. Pet. App. 32a-79a.[8] In these new rules, the Commission stated

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[6] The Commission's theory for what is actually a penalty is that the tariff should be treated as non-existent *ab initio*, even though it was physically on file, shippers knew of it, and freight moved under it.

[7] See generally *Tariff Integrity Board*, 44 Fed. Reg. 58511 (1979), *modified in part*, 367 I.C.C. 389 (1980), *rev'd*, *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 676 F.2d 1374 (11th Cir. 1982).

[8] Pub. L. No. 96-296, § 14, 94 Stat. 803 (codified at 49 U.S.C. § 10706(b)).

that it would use its alleged Section 10762(e) authority to strike and thereby nullify effective tariffs that had been adopted in violation of rate bureau agreements. Pet. App. 66a, 68a.[9]

The Commission also has asserted its purported authority to reject effective common-carrier tariffs in an entirely different context that directly concerns the railroads. Specifically, the Commission has issued a complex and detailed set of regulations governing the publication of tariffs.[10] Certain rules require all new tariff sheets to bear symbols indicating whether the new tariff increases, decreases or involves no change in the existing rate. See 49 C.F.R. §§ 1300.2(a), 1310.10(f)(1).[11] Given the thousands of new tariff filings annually, inadvertent errors in symbolization occasionally do occur, and in the past such errors have been corrected without rejecting an already effective tariff rate.

However, in its new regulations, the Commission has declared that *any* missymbolized tariff rate increase is invalid, even if the increase has already taken effect. The agency asserts that the effective rate shall be that specified by the tariff "purportedly superseded," thus giving rise to overcharge liability to affected shippers. See *Tariff Improvement*, 364 I.C.C. 217 (1980).[12] The Commission has expressly ac-

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[9] The Commission has indicated that it intends to use some form of complaint and hearing procedures to consider allegations of rate bureau violations. Pet. App. 68a, 78a, 90a.

[10] These regulations cover more than eighty pages of the Code of Federal Regulations in the case of motor carrier tariffs and more than seventy pages in the case of rail carrier tariffs. See 49 C.F.R. §§ 1300.00-.200, 1307.00-.202.

[11] For example, an increase must be marked with a diamond symbol or "(R)" and a decrease with a teardrop symbol or "(A)". See 49 C.F.R. §§ 1300.2, 1310.10(f)(1).

[12] The Commission's order adopting these new rules was sustained in *Aberdeen & R.R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982), *petitions for cert. pending* (Nos. 82-707, 82-804).

knowledged that such rejection of effective tariffs represents "a departure from numerous Commission and court decisions in the past."[13]

C. The Decision Below

A number of motor carrier rate bureaus sought review in the Eleventh Circuit of the ICC's December 1980 rate bureau rules, challenging, *inter alia*, the Commission's authority to reject and thus nullify effective tariff rates. The Court of Appeals agreed with the carriers, observing that Section 10762(e) enables the Commission to dispose summarily of *proposed* tariffs that contain "obvious defects." Pet. App. 27a-28a.

The Eleventh Circuit held that, once tariff rates become effective, there is no power to reject retroactively, noting that the Commission has other statutory procedures for dealing with effective tariff rates found to be unlawful after investigation and hearing, "including prescribing the proper rates and awarding damages for violation of the Act." Pet. App. 27a. In addition, the court stressed the extreme consequences of Commission rejection of an effective tariff—namely, the possibility of "overcharge" liability based solely on the earlier superseded tariff rate. Pet. App. 28a. The court also relied on the existence of "consistent Commission decisions" as well as pertinent precedent of this Court. Pet. App. 31a.[14]

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[13] See 44 Fed. Reg. 60123 (1979). The Commission has said it will apply the rejection power on a "case-by-case basis" and "automatic liability for overcharges" will not result "every time it is determined that [an] increase was improperly symbolized." *Tariff Improvement, Ex Parte No. 370* (ICC, Dec. 29, 1982). However, no standards for the exercise of this claimed discretionary power appear in the Commission's rules, much less in the Act.

[14] In an earlier decision reviewing new ICC tariff rules, the Eleventh Circuit similarly concluded that the Commission does not have authority to reject or strike effective carrier tariffs. See *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 676 F.2d 1374 (1982). The Government did not seek review of that decision.

In the Fifth Circuit, the railroads challenged the Commission's counterpart claim of authority to reject and nullify mis-symbolized tariffs even after they had become effective. The Fifth Circuit sustained the Commission, in direct conflict with the Eleventh Circuit. See *Aberdeen & R.R.R.* v. *United States*, *supra*. This Court granted the Government's certiorari petition to review the Eleventh Circuit's present decision and has deferred action on other certiorari petitions raising the same "rejection" power issue, including the railroads' petition to review the Fifth Circuit decision.

SUMMARY OF ARGUMENT

The issue in this case is whether, in addition to the explicit remedies and penalties provided in the Act, the Commission can reject retroactively effective common-carrier tariffs. This step would render carriers liable to refund transportation charges to shippers who suffered no actual harm. The Commission claims that this "administrative sanction" is necessary to implement the Motor Carrier Act of 1980 and that such a sanction "is not foreclosed by the Act." Pet. Br. 14, 23. In a companion case, the agency asserts the same "rejection" power to penalize rail carriers for tariff symbolization errors. See p. 7, above.

The Commission's claim of power to reject and nullify effective carrier tariffs is at odds with controlling decisions of this Court that have governed the Act's administration for decades; it is at odds with nearly uniform ICC practice for over fifty years; it is at odds with not only the decision below by the Eleventh Circuit but also recent decisions of the First and District of Columbia Circuits; and it is at odds with the structure and the history of the Act itself. Indeed, the legislative history, while intricate and requiring careful reading (see pp. 14-20, below), clearly confirms that Congress has *not* given the ICC discretionary authority to nullify effective tariff rates.

Furthermore, the Commission has no need for the tariff nullification power it now seeks to create. The Act's detailed system of remedies and penalties ensures that shippers may be

made whole for any harm from unlawful tariffs and amply deters deliberate unlawful action by carriers. The expanded and unbridled power sought by the Commission here would allow it to impose on carriers multi-million dollar *private* penalties that would constitute a windfall for shippers—a result squarely at odds with decisions of this Court holding that such private penalties are not proper under the Act.

ARGUMENT

I. Both the Act's Structure and Its Governing Principles Show That the ICC Cannot Nullify Effective Tariffs.

1. Congress, in regulating carriers, enacted a carefully integrated and complete system of procedures, remedies and penalties. See pp. 3-5, above. This Court has repeatedly said that the statutory plan must be respected by courts and the agency alike, and it has forbidden the use of implied or invented remedies that might disturb Congress' careful balance between carrier and shipper interests.[15] In this case, the Commission's present claim to authority to reject effective tariffs is fundamentally at odds with the statute.

The Act imposes on carriers two explicit forms of liability—damage liability (Section 11705(b)(2), (3)) and overcharge liability (Section 11705(b)(1)). Damages serve to make a shipper whole for any actual injury that he has suffered;[16] overcharges have similarly served in the past to make a shipper whole when he has been charged more than the existing, effective tariff rate.[17] The nullification liability that the Com-

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[15] *Consolidated Rail Corp.* v. *National Ass'n of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 441 U.S. 444, 456-59 (1979); *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 662-67 (1963).

[16] See, *e.g.*, *Spencer Plant Foods, Inc.* v. *Atlantic C.L.R.R.*, 302 I.C.C. 799, 800 (1958); *Boren-Stewart Company* v. *Atchison, T. & S.F. Ry.*, 196 I.C.C. 120, 125-26 (1933).

[17] See, *e.g.*, *Hamilton* v. *Pennsylvania R.R.*, 45 I.C.C. 191 (1917); *Charles Boldt Co.* v. *Pittsburg, C.C. & St.L. Ry.*, 42 I.C.C. 308 (1916).

mission now seeks to impose would bear no relationship either to any harm suffered by shippers or to the existing tariff rate.

For example, assume that the railroads inadvertently missymbolized a 5 percent increase in railroad rates, representing nothing more than a pass-through of increased operating costs. Under the new regulations, the Commission could seek to require the railroads to refund this entire amount, which could easily total millions of dollars in a single year.[18] Yet the railroads would have incurred the increased costs, the tariffs (though missymbolized) would have clearly set forth the 5 percent increase, and the shippers would have paid only reasonable rates and suffered no harm from the missymbolization.[19]

There is nothing whatever in the language of the Act that specifically permits the rejection of *effective* tariffs. There is nothing in the Act that provides for imposing private penalties by awarding refunds to shippers who have been charged the published tariff rate and who suffer no demonstrated harm. To "imply" from the Act authority for the bizarre nullification and refund sanction invented by the Commission is doubly unwarranted. For here Congress has provided explicit and rational remedies under Section 11705 for shippers harmed by violations of the Act.

2. The Commission's action is also in conflict with principles that have governed the interpretation of the Act since its inception. Just as the ICC's claim of authority cannot be

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[18] In the past, a misplaced comma in the publication of major rate increases produced refund claims totalling $4.5 million and estimated potential liability of approximately $25 million. See *Petition for a Declaratory Order—Inclusion of Interstate Application of Authorized General Rate Increases*, 359 I.C.C. 295, 302 n. 7 (1979).

[19] A corrected tariff might be filed for the future, but the Act does not provide a mechanism for retroactive rate increases in the case of defective tariffs. Cf. *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, *supra*, 676 F.2d at 1378.

squared with the Act's language and structure, so too the claim conflicts with settled principles reflected in decisions of this Court.

In one of its earliest decisions under the Act, this Court said that "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." *Parsons* v. *Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897). Even for an admitted violation of the Act's substantive provisions, a shipper is not entitled to a refund "without other proof of actual damage." *Davis* v. *Portland Seed Co.*, 246 U.S. 403, 415 (1924).[20] As this Court explained in *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 200 (1913), Congress did not intend to enable "persons not injured" to recover any "penalty" under the Act, "in addition to the penalty payable to the Government."[21]

Congress established clear and specific limits on the fines and other penalties that may be imposed on carriers under the various express penalty provisions set forth in the Act. See Section 11901, *et seq.* Despite such precision, the Commission contends that Congress, in the single bland sentence of Section 10762(e), has conferred upon it undefined and apparently unlimited discretion to impose on carriers sanctions that could be

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[20] Accord, *e.g.*, *ICC* v. *United States*, 289 U.S. 385, 389-93 (1933); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 164-65 (1922); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 204-206 (1913).

[21] In *Pennsylvania R.R.*, the Court clearly articulated the distinction made in the Act between private injury and public wrong:

> "The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties. . . . But for the public wrong and for interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given." 230 U.S. at 206.

vastly greater (see p. 11, above) than any conceivable fine under the Act.[22] Given the principles that have guided the Act's interpretation in the past, such a construction simply is implausible.

These principles cannot be overcome by general assertions that the power to reject effective tariffs would be useful to the Commission. The Commission has no legitimate need for authority to nullify effective carrier tariffs. If a shipper suffers injury because of either a technically defective tariff or a tariff that violates a substantive Commission rule (such as a motor carrier rate bureau rule), a damage remedy is available to make the shipper whole. See p. 4, above. And if a carrier willfully violates either the Act or the Commission's rules, specific penalties are provided. See pp. 4-5, above.[23]

Should the Commission require further authority to enforce the Act, it is free to seek such authority from Congress. But it is difficult to imagine anything more lame than a claim that the

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[22] Although the Commission asserts that it will use its "discretion" in imposing such penalties, neither the Act nor the Commission's rules provide any guidelines for exercising such discretion. The very claim that the Commission has such a sweeping latitude of discretion to impose multimillion-dollar penalties underscores the extraordinary character of the power it claims. Even for punishing a Sherman Act felony, a federal court is limited to a fine of $1 million in the case of a corporation, an amount that the Commission could easily exceed through retroactive rejection of a tariff rate increase. See p. 11 n. 18, above.

[23] Against this array of remedies and penalties expressly provided under the Act, it is sophistry for the Commission to suggest (Pet. Br. at 11, 22) that, unless it can punish motor carriers by nullifying effective tariffs, such carriers will seek to place into effect tariffs that violate motor carrier rate bureau agreements and will be able to retain "the fruits" of such violations. Moreover, apart from the Act itself, the risk of antitrust liability is certainly a powerful deterrent to any possibly anticompetitive ratemaking activities not in compliance with an approved rate bureau agreement.

existing combination of remedies and penalties under the Act is inadequate. Still less can one imagine Congress' granting a remedy of the type invented by the Commission in this case, providing multimillion-dollar windfalls to shippers at the whim of the agency.

II. The Act's History Confirms That Congress Did Not Intend to Authorize the ICC to Nullify Effective Tariffs.

1. Prior to 1935, there was no reference in the Act to *any* general rejection power,[24] and it was well established that an effective tariff could not be treated as a nullity. In fact, from virtually the outset of regulation in 1887, a fundamental purpose of the Interstate Commerce Act's common-carrier provisions has been "to secure uniformity of treatment to all, to supress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation."[25] To accomplish this purpose, the Act required that carriers file tariffs and strictly observe them until changed by new tariff filings.[26] Consistent with this requirement, the Court has repeatedly held that a filed and effective tariff sets forth the rate binding on carrier and shipper alike.[27]

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[24] In 1910, the Commission was given limited authority to reject rail-carrier tariffs that did not "give lawful notice" of their "effective date"—a provision phrased in terms that clearly referred solely to rejection of tariffs not yet effective. See p. 16, below.

[25] *Kansas C.S. Ry.* v. *C.H. Albers Comm'n Co.*, 223 U.S. 573, 597 (1912); accord, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72 (1908); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906).

[26] See Section 10762(a) (formerly 49 U.S.C. §§ 6(1), 317(a), 318(a)); Section 10761(a) (formerly 49 U.S.C. §§ 6(7), 317(b), 318(a)). See also, *e.g.*, *Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467, 476 (1911).

[27] See, *e.g.*, *Crancer* v. *Lowden*, 315 U.S. 631, 635-36 (1942); *Ballwin* v. *Milling Co.*, 307 U.S. 478, 484-85 (1939); *Davis* v. *Henderson*, 266 U.S. 92, 93 (1924); *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U.S. 278, 285 (1915); *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97, 121 (1914).

For decades it has been the law that, so long as a shipper pays no more than the rate stated in an effective tariff, he is entitled to recover only for actual *harm* resulting from a violation of the Act or a Commission rule or order. This Court made clear very early that a tariff accepted for filing may not be treated as a nullity, either because of some procedural defect in the filing or because of some substantive unlawfulness in the tariff rate. Thus, in *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914), the Court refused to permit a shipper to escape liability for demurrage charges on the theory that the tariff prescribing such charges was non-existent, even though the Court assumed *arguendo* that the Act's tariff filing formalities had not been strictly met. The Court emphasized that the tariff documents had been "received and placed on file by the Commission." *Id.* at 375.

Similarly, in *Davis* v. *Portland Seed Co.*, *supra*, a shipper contended that the tariff rate charged him—which admittedly was unlawful because it violated the Act's long-haul short-haul provision—should be treated as "non-existent" and that he should be allowed to recover on the basis of the lower rate charged favored shippers. The Court explicitly rejected the notion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to recover only any actual damages he had suffered (*e.g.*, due to loss of business). See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907) (filed and effective tariff could not be treated as a nullity because of alleged failure to comply with requirements that tariff be posted for public inspection).

This long-established principle that a filed and effective tariff may not be treated as a nullity contributes to the Act's goals of promoting certainty and protecting reliance on the filed tariff rates. Goods are shipped, revenues are collected, and business plans are formulated in reliance on established and effective rates. Carriers also have proceeded on the premise that tariff rates, if not unreasonably high, may be retained by them and are not liable to be repaid based on some

typographical flaw in the tariff or other defect unrelated to the substance of the rate. Indeed, it is impossible to see how any planning could reliably be done by carriers, already hard-pressed financially, in the face of the vast and uncertain liability now made possible by the Commission.[28]

Within this context, the ICC early in the history of the Act was given authority to reject a rail-carrier tariff "tendered for filing" that did not "give lawful notice of its effective date."[29] And, even without any broader statutory grant, the Commission proceeded to reject tariff filings that were patently defective in other respects—that is, returned them *before* they became effective.[30] But in none of these early tariff rejection decisions did the Commission assert, much less decide, that it could retroactively nullify effective common-carrier tariffs, thereby upsetting the settled expectations of affected carriers and shippers. See pp. 21-24, below.

2. In establishing motor carrier regulation, Congress did not confer any new authority to nullify effective tariffs. In 1935, Congress passed the original Motor Carrier Act, adding to the Interstate Commerce Act a new part concerning motor carrier regulation. See Act of Aug. 9, 1935, ch. 498, 49 Stat. 543. One of the provisions, modelled on railroad regulation, required motor common carriers to file tariffs, and the Commission was authorized to prescribe "the form and manner" of

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[28] In a decision released in August 1983, the Commission found that *none* of the nation's major railroads currently is revenue-adequate. See *Rail Revenue Adequacy-1982 Determination, Ex Parte No. 450*, at 3 (ICC, Aug. 19, 1983).

[29] See Act of June 18, 1910, ch. 309, § 9, 36 Stat. 548 (current version at Section 10762(e), former version at 49 U.S.C. § 6(9)).

[30] See, *e.g.*, *Charges for Transportation and Disposal of Waste Materials*, 34 I.C.C. 337 (1915) (proposed tariff rejected for failure to include information required by the Act); *Lumber to Texas Ports*, 44 I.C.C. 275, 275-76 (1917) (proposed tariff rejected because of conflict with Commission order).

the tariff filing. *Id.* at 560-61. In connection with this authority, the Commission was "authorized to reject any tariff filed with it . . . not in consonance" with either the tariff filing and publication provision itself or the Commission's tariff regulations. *Id.*

This tariff rejection language, originally set forth in the 1935 Act, is the direct source of the extraordinary authority that the Commission now asserts to nullify tariffs even after they have become effective.[31] However, it is clear that with this tariff language Congress merely provided the ICC with the same rejection power over motor carrier tariffs that it had long exercised over rail carrier tariffs—that is, the power to reject new tariffs summarily, prior to their taking effect, when they suffer some defect so patent as to warrant this administrative short-cut. No revolutionary change in the scope of the Commission's rejection authority was intended.

This conclusion is apparent upon considering the context in which Congress acted. Specifically, when Congress in 1935 legislated the language now set forth in Section 10762(e), the principle that filed and effective tariffs were not to be treated as nullities was well settled and a fundamental element of the existing tariff rate system for rail common carriers. As already shown (pp. 14-15, above), numerous decisions of this Court had held prior to 1935 that an effective tariff rate binds both carriers and shippers, and this Court's decisions also had established that effective tariffs could not be treated as non-existent

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[31] In 1978, the original language of the 1935 Act—which had been extended to railroads in 1940 (see p. 20, below)—was revised and codified in Section 10762(e). See revision notes to 49 U.S.C. § 10762. However, in doing so, Congress made clear that it intended no substantive change, and thus it did not expand or otherwise alter the scope of the rejection power initially conferred in the 1935 Act. See Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 n. 7 (1981).

even when some procedural or substantive defect was shown to exist.

Against the background of this substantial history and precedent, it is implausible that Congress, in enacting the 1935 Act, would have authorized the ICC to depart from the settled principle concerning the integrity of effective tariff rates, without providing some indication that it intended to do so. Yet, a review of the Motor Carrier Act's legislative history fails to reveal any mention of the tariff rejection authority, much less some indication that Congress intended to confer a new agency power to nullify effective tariffs retroactively.[52] The inference is thus overwhelming that Congress did not intend to grant such extraordinary authority to the Commission—just as in *Arrow Transp. Co.* v. *Southern Ry., supra*, 372 U.S. at 673, this Court concluded that Congress would "not have meant its silence alone to imply" a grant of judicial authority to enjoin carrier rate filings.[53]

Moreover, other aspects of the 1935 Motor Carrier Act confirm this conclusion. First, the 1935 Act also included virtually

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[52] See S. Rep. No. 482, 74th Cong., 1st Sess. (1935); H.R. Rep. No. 1645, 74th Cong., 1st Sess. (1935). Even in providing the Senate with a detailed section-by-section explanation, the Senate sponsor of the Motor Carrier Act of 1935 did not see fit to make any mention whatsoever of the tariff rejection language in which the Commission now finds a sweeping grant of authority to overturn effective tariffs at will. See 79 Cong. Rec. 5656 (1935) (remarks of Senator Wheeler). See also 79 Cong. Rec. 12206 (1935) (remarks of Mr. Sadowski).

[53] The Commission asserts, of course, that the language of Section 10762(e) supports its claimed authority to nullify effective carrier tariffs. Pet. Br. 14-17. But the Eleventh Circuit in an earlier decision carefully analyzed Section 10762(e)'s language and found to the contrary that the "plain meaning" of such language indicates that the ICC's tariff rejection power extends only to "proposed" tariff rates that have not yet become effective. See *Southern Motor Carriers Rate Conf., Inc.* v. *United States, supra*, 676 F.2d at 1377-78. The Commission argues in particular that, by precluding all "use" of a

the same language already set forth in the Interstate Commerce Act, requiring strict adherence to effective tariff rates.[34] It is unlikely, at best, that Congress would simply have repeated this requirement if it had intended to alter the settled principle that effective tariff rates must be observed and to permit Commission nullification of such rates.

Second, the 1935 Motor Carrier Act provided a specific, detailed procedure for challenging the lawfulness of an effective tariff rate.[35] Under this provision, the Commission has authority "after hearing" to determine a tariff rate's lawfulness and to prescribe an appropriate rate if the existing rate is found illegal. This specific and distinct procedure for challenging unlawful tariff rates hardly comports with the Commission's claimed power to overturn common-carrier rates merely by striking effective tariffs.[36]

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rejected tariff (see 49 Stat. 561), "Congress anticipated that some tariffs would be in effect when rejected . . . ." Pet. Br. 17. However, it is apparent that Congress simply intended to make clear that a rejected proposed tariff was not to be employed or applied in any fashion—a view entirely consistent with its own emphasis on respecting a tariff filing once effective.

[34] Compare Act of Aug. 9, 1935, ch. 498, § 227(b), 49 Stat. 561 (current version at Section 10761(a)), with Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 587 (current version at Section 10761(a)).

[35] See Act of Aug. 9, 1935, ch. 498, § 216(e), 49 Stat. 558 (current version at Section 10704).

[36] The Commission attempts to cloud the distinction between the procedure for challenging effective tariffs and the rejection power set forth in Section 10762(e) by stressing that in the present context it will exercise its rejection power with regard to effective tariffs only after a "full hearing." Pet. Br. 8, 12, 33. But this amalgamation of a hearing procedure with the rejection power has no basis in either Section 10762 or any other provision of the Act. The hearing procedure has simply been patched together by the Commission itself in an apparent effort to make its claim of expansive rejection authority more palatable.

Subsequently, in the Transportation Act of 1940, Congress amended the rail-carrier portion of the Interstate Commerce Act to include the same tariff rejection language introduced in the Motor Carrier Act.[37] This change, made as part of a general updating that included many minor revisions, did not enlarge the agency's tariff rejection power. Rather, the committee reports accompanying the 1940 legislation make clear that the language was derived from the 1935 Motor Carrier Act[38] and that it was intended merely to "clarify" the Commission's authority to reject tariff schedules "required to be filed" under the Act.[39] In other words, Congress simply gave explicit recognition in the rail-carrier portion of the Act to the agency's conceded administrative authority to return defective tariff filings before they became effective. Nothing suggests that Congress intended to overturn this Court's established precedents or to permit rejection of common-carrier tariffs *after* they had taken effect.

In sum, Congress has never given the ICC the extraordinary tariff nullification power now claimed. Long in advance of motor-carrier regulation, it was settled that filed and effective tariffs may not be treated as non-existent, whether because of a purported procedural or substantive defect. Congress in no way altered this principle when it made provision for motor-carrier regulation in 1935, nor has it done so subsequently.[40]

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[37] See Transportation Act of 1940, ch. 722, § 8, 54 Stat. 910.

[38] See S. Rep. No. 433, 76th Cong., 1st Sess. 11 (1939).

[39] 86 Cong. Rec. 10167 (1940) (conference report to Transportation Act of 1940).

[40] The Commission now alternatively argues that its authority to nullify effective tariffs should be sustained as a reasonable adjunct to Congress' mandate in the Motor Carrier Act of 1980 that carriers adhere strictly to their approved rate bureau agreements. Pet. Br. 20-25. This argument is based exclusively on a theory of "ancillary power" derived from the Motor Carrier Act (Pet. Br. 21) and is distinct from the Commission's contention that it has authority under

III. Administrative and Judicial Precedent Support the Conclusion That Congress Did Not Intend to Authorize the ICC to Nullify Effective Tariffs.

1. ICC precedents have long recognized that, once a regulated carrier's tariff becomes effective, the Commission has no authority to treat such a tariff as a nullity, whether pursuant to its tariff rejection power or otherwise. This longstanding interpretation deserves significant weight as against the agency's recent *ad hoc* claim of power,[41] for "the want of assertion of power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred."[42]

For example, more than sixty years ago in *Nashville Traffic Bureau* v. *Louisville & N.R.R.*, 53 I.C.C. 37 (1919), an effective tariff rate was attacked as unlawful because the tariff was "published and filed in contravention of [an] outstanding [Commission] order" prescribing a lower maximum rate than was set forth in the tariff. Despite this violation, the Commission recognized that the filed and effective tariff set forth the governing rate for the shipments. Shippers were held entitled to damages, but the rate was not deemed a nullity even though it contravened an express Commission order. See *id.* at 38.

Section 10762(e) to reject effective tariffs. Although the Commission's alternative theory solely concerns motor carriers, it is clear that this claimed ancillary power is equally at odds with the structure of the Act and its bar against private penalties. Further, this theory was not relied upon by the Commission in adopting the rules now at issue.

[41] See, *e.g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); *Bingler* v. *Johnson*, 394 U.S. 741 (1969).

[42] *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941) (citation omitted). See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949).

In *Lamb-Fish Lumber Co.* v. *Yazoo & M.V. R.R.*, 42 I.C.C. 470 (1916), the Commission similarly recognized that it could not treat an effective tariff as a nullity, despite the fact that that the tariff set forth incorrect lower rates due to a publication error and the shipper was apparently aware of the error. The Commission stressed that

> "proof of error in publication of rates does not justify departure from the published rates. The fact that shippers may have full knowledge that the rates were published in error cannot alter the plain terms of the law." *Id.* at 471.

The carrier was thus required to treat the published rate as controlling and was not allowed to retain the higher rate intended to be charged.

And in *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R.R.*, 277 I.C.C. 641 (1950), the Commission again rejected claims that published tariff rates should be ignored because they violated an outstanding ICC order. The Commission ruled that "[w]here tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." *Id.* at 644. In the Commission's view, tariff rates, once effective, could not be treated as nullities.[43]

Nashville Traffic Bureau, *Lamb-Fish Lumber*, and *Acme Peat Products* are only a small sample of a long line of Commission decisions recognizing that filed and effective tariffs, even if substantively or procedurally defective, may not be treated as a nullity.[44] The Commission ignores these decisions when it

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[43] See also *Acme Peat Products, Ltd.* v. *Akron, C. & Y.R.R.*, 293 I.C.C. 510, 510-11 (1954).

[44] See, *e.g.*, *Ralston Purina Co.* v. *Atlanta, B. & C.R.R.*, 174 I.C.C. 722, 724 (1931); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 185 I.C.C. 233 (1932); *Kansas City Fuel Oil Co.* v. *Atchison, T. & S.F. Ry.*, 210 I.C.C. 134, 136 (1935); *National Pressed Steel Co.* v. *Alabama G.S.R.R.*, 289 I.C.C. 673, 683 (1953); *Phillips Petroleum Co.* v. *Akron, C. & Y.R.R.*, 308 I.C.C. 257, 259-60 (1959); *Shobe, Inc.* v. *Bowman Transp., Inc.*, 350 I.C.C 664, 669-71 (1975).

asserts that it "has long assumed" the authority to reject effective tariff rates and thus impose overcharge liability. Pet. Br. 17. Although the Commission cites cases of its own, almost none involved the retroactive rejection of effective common-carrier tariffs.[45] The only Commission precedent expressing its present view is the 1978 decision in *H.J. Baker & Bros., Inc.—Statute of Limitations*, 357 I.C.C. 640 (1978); and, even in that case, the Commission's statements were dicta since it ultimately awarded damages rather than the far larger "overcharge" liability consistent with its present claim of power.[46] Such recent dicta, "being in conflict" with the ICC's longstand-

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[45] Two of the cases are patently irrelevant. *Conrail Surcharge on Pulpwood*, 362 I.C.C. 740, 755 (1980), did not concern tariff rejection at all; the issue was refund liability under 49 U.S.C. § 10707(d) for a rate surcharge that had been allowed to take effect subject to investigation. Nor, as the Commission now claims (Pet. Br. 17), did *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 I.C.C. 337, 343 (1944), hold that overcharge liability arises when an effective tariff rate is found unlawful; rather, that decision makes clear that damages are the remedy for an unlawful tariff rate. See *id.* at 341-43. As for *Acme Fast Freight, Inc., et al., Common Carrier Application*, 17 M.C.C. 549 (1939), *sustained*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940), and *Mercer V.R.R.* v. *Pennsylvania R.R.*, 69 I.C.C. 233 (1922), these cases involve jurisdictional decisions in which the Commission struck from its files rate sheets of companies that it found were not common carriers subject to the Act's provisions. In other words, the rate sheets involved were not common-carrier tariffs within the scope of the Act. Thus, striking such rate sheets could not give rise to overcharge liability based on any prior, applicable common-carrier tariffs.

[46] In *H.J. Baker & Bros.*, the ICC held that shippers were entitled to recover only the difference between the rate charged and a lower previously prescribed rate (2%), an amount reflecting actual injury; it did not treat the tariff as a nullity and award the difference between the rate charged and the immediately prior tariff (14%). See 357 I.C.C. at 646. This approach was specifically sustained in *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982).

ing construction, are hardly substantial evidence of the proper construction of the Act. Cf. *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981).[47]

The Commission was entirely candid when, in proposing its new tariff symbolization rules, it recognized that its rejection penalty represented "a departure from numerous Commission and court decisions in the past." 44 Fed. Reg. 60123 (1979). The Fifth and Eleventh Circuits have both likewise recognized that the Commission's claimed authority in this case "moves away from an impressive list of prior decisions by the Commission"[48] and disregards "a long line of [prior] cases."[49] Coupled with objections based on the Act's structure, the legislative history and prudential concerns, this departure from past agency precedent is a final sign post that the agency should be reversed.

2. Judicial precedent also undermines the Commission's position. This Court's decisions in *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, *supra*, and *Davis* v. *Portland Seed Co.*, *supra*, clearly holding that an effective common-carrier tariff may not be treated as a nullity (see p. 15, above), have never been modified or limited in any way. Nor has the Court altered its prior decisions (see p. 12, above) emphasizing that damages are based on actual harm and that private penalties are not authorized under the Act. And this Court in *Consolidated Rail Corp.* v. *National Ass'n of Recycling Indus-*

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[47] In one other recent decision cited by the Commission, *National Ass'n of Specialized Carriers, Inc., Agent—Show Cause and Strike Order*, I.C.C. Order No. 36870 (served April 11, 1978), a tariff was declared null and void where tariff subscribers had not been given proper notice of the tariff, contrary to express representations made to the Commission. Because the tariff issuers' error was discovered almost immediately after the tariff took effect, the Commission's action involved no prospect of significant overcharge liability.

[48] *Aberdeen & R.R.R.* v. *United States*, *supra*, 682 F.2d at 1099.

[49] *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, *supra*, 676 F.2d at 1379.

tries, Inc., 449 U.S. 609 (1981), has only recently confirmed its long-held view that the Act's remedies are an integrated whole not lightly to be altered or enlarged by court or agency.[50]

The Commission does attempt to distinguish both *Berwind-White* and *Davis*.[51] But the Commission's strained distinctions simply miss the critical fact here. When Congress in 1935 added a "tariff rejection" provision to the Motor Carrier Act, *Davis*, *Berwind-White* and respect for tariff integrity were settled law and Congress gave no hint that it was changing the law to permit nullification of effective tariffs. If Congress had intended to override Supreme Court decisions on the status of effective tariffs—instead of merely to codify existing agency practice on pre-effective rejection—it is impossible to believe that it would have done so silently.

Furthermore, *Davis* and *Berwind-White* are not ancient and outdated precedents; as recently as 1981, the D.C. Circuit—

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[50] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), cited by the Commission (Pet. Br. 25), affords it no support. In that case, the Court held that a unilateral tariff change by the carrier could not override a previously filed contract permitted as a rate-setting device under the special terms of the Natural Gas Act. Thus, the shipper there was entitled to the lower contract rate not because the agency had any tariff nullification power, as here claimed by the ICC, but because the prior contract was still valid and binding.

[51] Strangely, the Commission purports to distinguish *Berwind-White* on the basis that the alleged tariff filing informalities "were not grounds for invalidation" of an effective tariff. Pet. Br. 29 n.29. That is precisely the railroads' point: a tariff cannot be nullified because of a procedural flaw in the tariff's promulgation after it has gone into effect. As for *Davis*, the Commission says that it involved no issue of the agency's asserted "discretion" to reject an effective tariff. Pet. Br. 28-29. Yet, *Davis* squarely holds that the Act "requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." 264 U.S. at 425.

with the support of the Commission—relied on both cases in holding:

> "The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity."[52]

The court emphasized that ICC precedents had repeatly "rejected arguments that a filed tariff should be treated as nonexistent because it was inconsistent with a Commission limiting order . . . ." *Id.*

The D.C. Circuit's decision in *Genstar* was itself preceded by the *Delta Airlines* case, where a different panel of the same circuit held explicitly, with respect to the Federal Aviation Act, that "the Act does not permit rejection, as opposed to investigation, after a tariff becomes effective."[53] Only last year, *Genstar* and *Delta* were followed by the First Circuit in *Providence & Worcester* case[54] and by the Eleventh Circuit in this case,[55] which also cited this Court's decision in *Davis*. Pet. App. 28a. *Genstar*, *Providence & Worcester*, and this case all involved the Interstate Commerce Act, and all are at odds with the Commission's present claim of authority to nullify effective carrier tariffs.

The only substantial support for the Commission's position comes from the 25-year-old decision in *Alouette Peat*.[56] The

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[52] *Genstar Chemical Ltd.* v. *ICC*, *supra*, 655 F.2d at 1308-09.

[53] *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247, 268 (1976).

[54] *Providence & W.R.R.* v. *United States*, 666 F.2d 736, 744 (1982).

[55] Pet. App. 28a.

[56] *Chicago, M., St.P. & P. R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1958). *Alouette Peat* was cited in *Axinn & Sons Lumber Co.* v. *Long Island R.R.*, 466 F. Supp. 993, 997 (E.D.N.Y. 1978), but that case involved an essentially different problem as to whether a tariff had in fact been authorized for filing by the propo-

artificial and stilted analysis in that case has been rejected by the First Circuit (*Providence & Worcester*), the D.C. Circuit (*Genstar*), and the Eleventh Circuit (this case). Finally, the Commission itself only recently told the D.C. Circuit that *Alouette* was "in error" in treating a flawed rate increase as "void ab initio"[57]—the very nullification power the ICC now asserts for itself in this Court.

Even if the Circuit Court decisions were evenly divided, the controlling decisions are those of this Court. Significantly, the Commission recently cited *Berwind-White* and *Davis* to this Court, as strongly suggesting that "recovery for a tariff's failure to comply with a formal requirement may be limited to the amount of damage suffered by the shipper."[58] This principle, which has guided the treatment of effective tariffs since the passage of the Act, is inconsistent with a tariff nullification power and controls this case.

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nent carriers. And *Alouette Peat* was relied on heavily in *Aberdeen & R.R.R.* v. *United States*, *supra*, 682 F.2d at 1101-02, but that decision is currently before this Court on petitions for certiorari (Nos. 82-707, 82-804).

[57] See joint brief for the Interstate Commerce Commission and the United States, *Genstar Chemical Ltd.* v. *ICC*, No. 80-1170, *et al.*, D.C. Cir., p. 23.

[58] See brief for the federal respondents in opposition, *Nitrochem, Inc.* v. *ICC*, No. 81-1205, U.S. Sup. Ct. p. 6.

CONCLUSION

For the reasons cited, the decision of the Court of Appeals should be affirmed.

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No. 82-1643-CFX
Status: GRANTED

Title: Interstate Commerce Commission, et al., Petitioners
v.
American Trucking Associations, Inc., et al.

Docketed:
April 7, 1983

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: McElligot, Patrick, Kiley, Edward J.

Entry	Date	Note	Proceedings and Orders
1	Apr 7 1983	G	Petition for writ of certiorari filed.
3	Apr 22 1983		Order extending time to file response to petition until May 31, 1983.
4	Jun 1 1983		DISTRIBUTED. June 10, 1983
5	May 31 1983	X	Brief of respondents Am. Trucking Assn., et al. in support of petition filed.
6	Jun 20 1983		Petition GRANTED.
			**********
8	Jul 25 1983		Order extending time to file response to petition until September 3, 1983.
9	Aug 8 1983		Joint appendix filed.
10	Aug 18 1983		Record filed.
11	Aug 18 1983		Certified original transcript of record, 2 volumes, received.
12	Sep 3 1983		Brief of petitioner United States filed.
14	Oct 4 1983		Order extending time to file response to petition until November 10, 1983.
15	Nov 10 1983		Brief amicus curiae of Aberdeen & Rockfish Railroad Co. filed.
16	Nov 10 1983		Brief of respondents Am. Trucking Assn., et al. filed.
17	Nov 15 1983		CIRCULATED.
18	Nov 23 1983		SET FOR ARGUMENT. Tuesday, January 10, 1984. (4th case).
19	Dec 23 1983	X	Reply brief of petitioner United States filed.
20	Jan 10 1984		ARGUED.